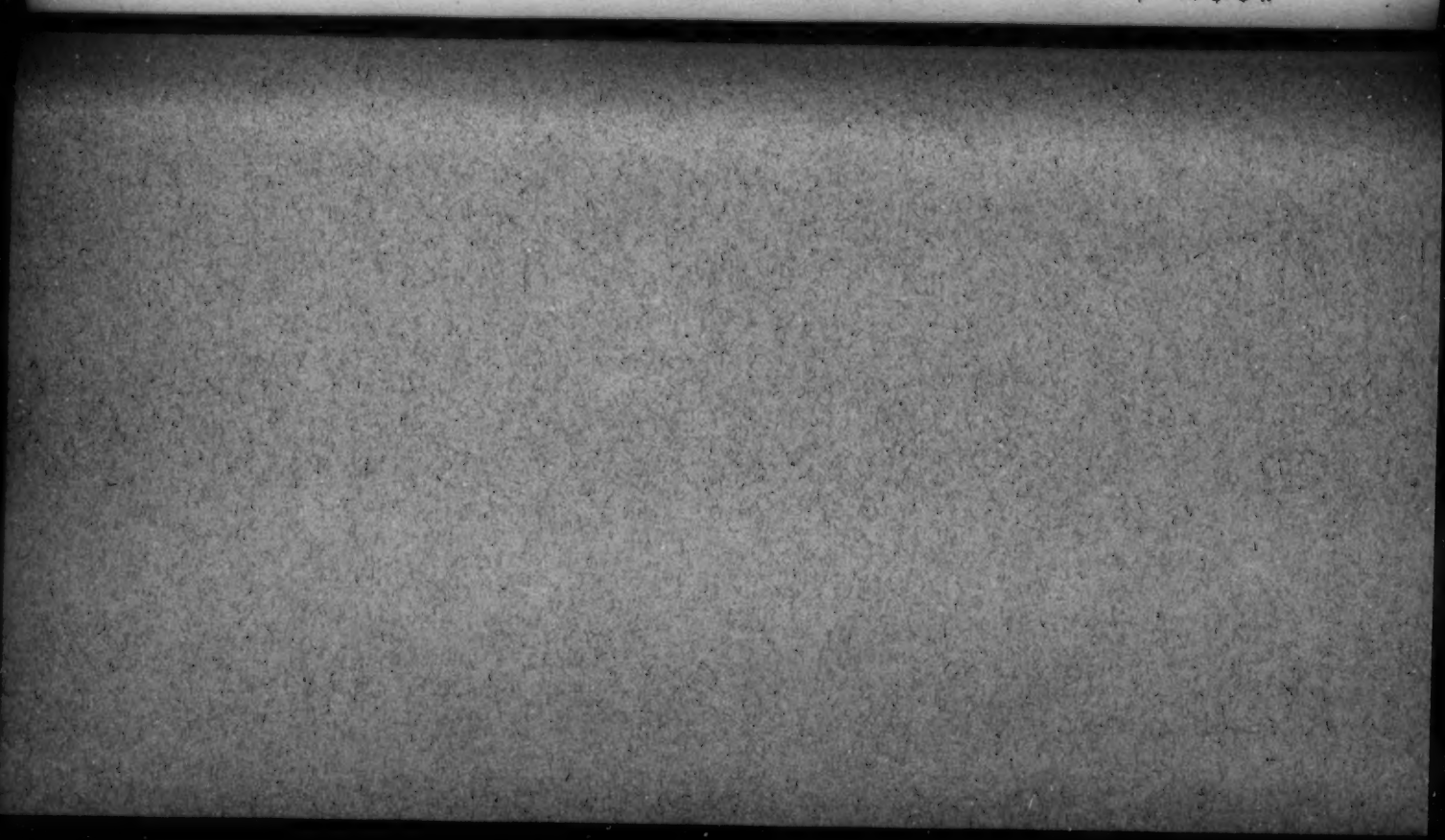
VOLUME I. NUMBER 3.

Massachusetts Law Quarterly

MAY, 1916

CONTENTS

Issued Quarterly by the
MASSACHUSETTS BAR ASSOCIATION, 16 Central St., Boston, Mass.



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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS, OF AUGUST 24, 1912,

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President, Henry M. Sheldon. *Treasurer*, Charles H. Beckwith. *Secretary*, Frank W. Grinnell.
Known bondholders and other security holders, none.

FRANK W. GRINNELL.

Sworn to and subscribed before me this 11th day of April, 1916.

Harvey H. Bundy,
Notary Public.

[seal]

Entered as Second-Class Matter at the Post Office at Boston.

INTRODUCTORY ANNOUNCEMENT.

In view of the fact that the bound annual reports of the Association are to be discontinued as a result of the publication of this magazine, questions have been asked whether the printing of the annual list of members of the Association and of the annual necrology, containing obituary notices of deceased members, is to be discontinued. In order that the plan of the magazine may be clearly understood, the Publication Committee wishes to explain that these features of the previous annual reports will not be discontinued, but that an annual supplement to the August number of the magazine will be printed in the form of a separate pamphlet which will contain the list of members of the Association and their addresses, and will contain also extracts from memorials and obituary notices of members who have died during the year.

Members of the Association are requested to notify the Secretary of the death of members of the bar in their locality, as otherwise the death of some members of the Association might not be called to his attention.

The present number contains a notice of acts passed by the present Legislature up to the time of going to press, of special interest to the bar in general. The discussion of some of the legislation which was proposed and was not passed by the Legislature will appear in the August number.

Members are constantly telephoning to the Secretary, to an increasing degree, to ask for information in regard to statutes, or other matters, which have been fully explained in print, either in previous numbers of this magazine, or in previous reports or other documents, which have been distributed to all members of the Association in the past. The Secretary is very glad to furnish all such information that he can and to furnish additional copies of such documents as long as the supply lasts. Many of these inquiries result from the fact that some members do not realize that this magazine, and the other pamphlets which are sent from time to time, contain, and will contain, practical information

likely to be useful at any time to any member of the bar in his practice, and that some of this information cannot be found elsewhere in print. It is for the purpose of providing members of the bar with such information, so that they will have it at hand for convenient reference, that these publications are sent out, and the Publication Committee, therefore, again reminds members that they may find it worth while to preserve these pamphlets.

HENRY N. SHELDON,
JOHN W. HAMMOND,
GEORGE R. NUTTER,
FRANK W. GRINNELL,
Committee on Publication.

AN ACT TO ASCERTAIN AND CARRY OUT THE WILL OF THE PEOPLE RELATIVE TO THE CALLING AND HOLDING OF A CONSTITUTIONAL CONVENTION.

(*Chapter 98 of the General Acts of 1916.*)

Be it enacted, etc., as follows:

SECTION 1. For the purpose of ascertaining the will of the people of the commonwealth with reference to the calling and holding of a constitutional convention, the secretary of the commonwealth shall cause to be placed on the official ballot to be used at the next annual state election the following question: — "Shall there be a convention to revise, alter or amend the constitution of the commonwealth?" The votes upon said question shall be received, sorted, counted, declared, and transmitted to the secretary of the commonwealth, laid before the governor and council, and by them opened and examined, in accordance with the laws relating to votes for state officers so far as they are applicable. The governor shall, by public proclamation, on or before the first Wednesday in January next, make known the result by declaring the number of votes in the affirmative and the number in the negative; and if it shall appear that a majority of said votes is in the affirmative, it shall be deemed and taken to be the will of the people that a convention be called and held to revise, alter or amend the constitution, and in his proclamation the governor shall call upon the people to elect delegates to the convention, at a special election to be held in all the cities and towns of the commonwealth on the first Tuesday in May in the year nineteen hundred and seventeen.

SECTION 2. The number of delegates to be elected to the convention shall be three hundred and twenty, of whom sixteen shall be elected at large, sixty-four by the sixteen congressional districts, to wit, four by each district, and two hundred and forty by the legislative representative districts of the commonwealth, each district having the

same number of delegates as it is then entitled to elect representatives to the general court.

SECTION 3. Nomination of candidates for the office of delegate to the constitutional convention shall be made by nomination papers without party or political designation which shall be signed in the aggregate by not less than twelve hundred voters for each candidate at large, by not less than five hundred voters for each candidate for delegate from a congressional district, and by not less than one hundred voters for each candidate for delegate from a legislative representative district. Said papers shall be filed on or before five o'clock in the afternoon on the first Tuesday in March in the year nineteen hundred and seventeen. No person shall be a candidate for delegate in more than one district, or both in a district and at large. If nomination papers for more than one nomination for delegate are filed in behalf of a candidate, and if, within seventy-two hours after five o'clock in the afternoon of the first Tuesday in March aforesaid, he withdraws all but one nomination, the remaining nomination shall be valid. No person shall be a candidate for delegate from a legislative representative district in which he does not reside.

SECTION 4. If in the commonwealth at large, or in any district, the number of persons nominated by nomination papers equals or exceeds three times the number to be elected delegates as provided by section two, a non-partisan primary shall be held in the commonwealth, or in such district, on the first Tuesday of April in the year nineteen hundred and seventeen. At such primary, twice the number of persons to be elected delegates shall be chosen from those nominated by nomination papers, and those so chosen shall be deemed nominated as candidates for delegate, and their names only shall appear on the ballot at said special election. The provisions of section five of this act shall, so far as is consistent herewith, apply to the primaries provided for by this section.

SECTION 5. At the special election to be held under the provisions of section one, every person then entitled to vote for state officers shall have the right to vote for sixteen

delegates at large, for four delegates from his congressional district, and for the number of delegates from his representative district to which that district is entitled under the provisions of section two. The number of delegates of each class for which the voter has the right to vote shall appear on the official ballot. No party or political designation shall appear on said ballot.

SECTION 6. The persons elected delegates shall meet in convention in the state house, in Boston, on the first Wednesday in June in the year nineteen hundred and seventeen. They shall be the judges of the returns and election of their own members, and may adjourn from time to time; and one hundred and sixty-one of the persons elected shall constitute a quorum for the transaction of business. They shall be called to order by the governor, and shall proceed to organize themselves in convention, by choosing a president and such other officers and such committees as they may deem expedient, and by establishing rules of procedure; and when organized, they may take into consideration the propriety and expediency of revising the present constitution of the commonwealth, or making alterations or amendments thereof. Any such revision, alterations or amendments, when made and adopted by the said convention, shall be submitted to the people for their ratification and adoption, in such manner as the convention shall direct; and if ratified and adopted by the people in the manner directed by the convention, the constitution shall be deemed and taken to be revised, altered or amended accordingly; and if not so ratified and adopted the present constitution shall be and remain the constitution of the commonwealth.

SECTION 7. The convention shall be provided by the sergeant-at-arms, at the expense of the commonwealth, with suitable quarters and facilities for exercising its functions. It shall establish the compensation of its officers and members, which shall not exceed seven hundred and fifty dollars for each member of the convention as such. It shall, subject to the approval of the governor and council, provide for such other expenses of its session as it shall deem expedient, and may cause to be prepared and issued a statement

briefly setting forth such arguments as the convention may see fit relative to any revision, alteration or amendment of the constitution adopted by it, or any part thereof. The members of the convention shall receive the mileage specified in section eight of chapter three of the Revised Laws, as amended by chapter six hundred and seventy-six of the acts of the year nineteen hundred and eleven. The governor, with the advice and consent of the council, is authorized to draw his warrant on the treasury for any of the foregoing expenses.

SECTION 8. The secretary of the commonwealth is hereby directed to transmit forthwith printed copies of this act to the selectmen of each town and the mayor of each city within the commonwealth; and whenever the governor shall issue his proclamation, calling upon the people to elect delegates, the secretary shall also, immediately thereafter, transmit printed copies of said proclamation, attested by him, to the selectmen and mayors.

SECTION 9. All laws relating to nominations and nomination papers, and to primaries, elections, and corrupt practices therein, shall, so far as is consistent herewith, apply to the nomination of candidates for delegate to the convention, and to the primaries and special election provided for by this act. [*Approved April 3, 1916.*]

THE PLACE OF JUDGE STORY IN THE MAKING OF AMERICAN LAW.*

(An address delivered before the Cambridge Historical Society and reprinted by permission.)

Perhaps an apology is due to-day from one who is rash enough to assert that any man can have a place in the making of any legal system. Lord Campbell, it is true, thought that the history of the holders of the Great Seal was the history of the English constitution and the history of English law. But he would have the modern jurists against him. The historical jurists would tell him that the contents of a legal system are the necessary result of the whole history of a people; that they are no more to be explained by the labors of individuals than is language, and that law has grown up with the people itself as an integral part of its character. The positivists would tell him that social, and hence legal, phenomena follow necessarily from the nature of men and from the nature of their relationships; that men may learn to describe the process by which law comes into being, but may not presume to control it. The head of the most numerous and most active sect among the philosophical jurists would assure him that law is no more made by the individual than is history; that the lawmaker is the man of his time, thoroughly saturated with the thoughts of his time, filled with the culture that surrounds him, working with the ideas and conceptions of his time and place, and speaking with words whose meanings were fixed by the sociological process of linguistic development. Finally, the adherents of the economic interpretation, who include distinguished representatives in American legal scholarship, would urge upon him that "all juridical history is economic," that the "underlying causes of most of the changes in the law are really economic," and that rules of law are in fact "established by the self-interest of the dom-

* This address was also printed in the *American Law Review* for September-October, 1914.

inant class." The individualist, who thought of the great juristic personality as free, as a creator, as shaping the course of the judicial and juristic current, rather than as borne along by its resistless movement, has all but disappeared from legal literature.

Happily, at least the extremer forms of the foregoing doctrines are beginning to give way before a renascence of juridical idealism. In some measure indications are not lacking that we are about to return to what was sound in eighteenth-century ideas. Not, indeed, that we shall ever hold them again in their old, absolute form. But the mechanical ideals of the historical school and of the positivists, the idea of mills of the gods through which legal systems are slowly weaving, by a course of inevitable and predestined evolution, while men sit by as mere observers, are as obsolete as the equally absolute notions of the school of natural law. No institution is the product of one sole cause. Usually it is the resultant of many causes. One observer will dwell upon this cause and another upon that; but we may be confident, with good reason, that all have been factors of greater or less importance. Certainly in all legal history, the great lawyer has not been the least factor. Try to imagine Roman law without Papinian and Ulpian and Paul. Think of international law without Grotius, of French law without Pothier, of German law without Savigny, of the common law without Coke, of American constitutional law without Marshall. If Coke and Marshall and Savigny were children of their times, they were children who knew how to get their own way! To take but one example, Bacon represented the spirit of the seventeenth century much more than Coke; the Star Chamber and the Court of Requests were modern tribunals, as things went then, while the King's Courts at Westminster were thoroughly medieval. Yet Coke impressed the system of these medieval courts upon us so completely that subsequent times, still constrained to walk therein, are far from content. Maitland, indeed, does not hesitate to attribute to Coke's "masterful, masterless" spirit a controlling part in preventing a reception of Roman law in

England. To use his words, "that wonderful Edward Coke was loose. The medieval tradition was more than safe in his hands."

If, then, one may venture to assign to individuals some real place in the making of our legal system, I suppose all would agree that three names stand out before all others, namely, Marshall, Kent, and Story. Probably the only names that one hears joined with these are those of Gibson, Shaw, Ruffin, and, more recently, Doe. But the influence of each of the latter is far less, and, indeed, is to no small extent local. The three first-named affected our legal system as a whole. Each had a national, if not, since the common law is fast becoming a law of the world, a universal, influence.

Marshall affected the development of our law in but one way, namely, from the bench judicial by decision. Moreover, his work was done substantially in one field, that of public law, though he made that field almost wholly his own. Kent affected the development of the law in three ways: as a judge, by decisions; as a writer, by his institutional treatise that still stands by the side of Blackstone; and as a teacher. Story also affected the development of the law in three ways: as a judge, as a writer, and as a teacher. But his judicial service was longer than Kent's, as a writer he was incomparably more active and prolific than was Kent, and his opportunities as a teacher were far greater. In truth, Story's position in the history of American law is unique. He was a colleague of Marshall in the great days, and he wrote the opinion of the court in some of the cases that made our constitutional law. He survived Marshall fourteen years, and stood for the old court among a newer generation to whom men looked vainly to undo its work. After Kent, he was the pioneer among our great text-writers. And while Kent went no further than an institutional book, the latter was scarcely more than complete when Story began a series of treatises which were to cover the great fields of Conflict of Laws, Constitutional Law, Equity, and Commercial Law, often with the pioneer work in English, and always in such wise

as to long furnish the model for those who came after him. Moreover, Kent's lectures at Columbia were a bagatelle compared with Story's service of sixteen years at the head of an established law school, almost a quarter of a century old when he came to preside over it, to which his fame as a judge and as a writer, and his zeal as a teacher, gave an unquestioned primacy. Such an opportunity of judging, writing, and teaching at a critical period in the history of a legal system has fallen to the lot of very few. It is not too much to compare him, in this respect, with the great Roman jurists of the third century, with the great doctors of the revival of Roman law, with Pothier and with Savigny. In our own law perhaps no one but Coke has had an equal opportunity.

Two periods in our legal history require special study by any one who would know Anglo-American law. The first is the classical common-law period, the end of the sixteenth and beginning of the seventeenth century. The other is the period which some day will be regarded as no less classical than the former — the period of legal development in America that came to an end with the Civil War. It is very easy to begin the history of a legal system too far back. Pollock is well warranted in insisting that the history of the common law, for practical purposes, begins at the end of the thirteenth century. For American purposes one might well begin with the seventeenth century. For the common law which we received was Coke's common law. English case law and English legislation prior to Coke were summed up for us and handed down to us by that indefatigable scholar in what we have chosen to consider an authoritative form; and we have looked at them through his spectacles ever since. In like manner the history of the common law in America begins, for practical purposes, after the Revolution, and the century ending with 1876 sees an American common law fully established and beginning to show the rigidity and the dogmatic inflexibility of a settled system.

Law made little progress in America in the seventeenth century. Social and economic conditions were such

that a rude administration of justice by magistrates sufficed. With the accumulation of property a demand for law grew up. In the eighteenth century it came to be felt that there must be authoritative standards to restrain or to guide the magistrate. But there was much to hinder the development of law. Luther's maxim, *Juristen böse Christen*, has appealed to the pious ever since; and our fathers had special reasons for suspicion as to the wisdom of receiving English law. Some of them had had experience of the operation of its doctrines as to misdemeanors and of its mode of conducting political and criminal prosecutions, and the memory and tradition of this experience have left their mark upon our law to-day in the doctrine that there is no common law of the United States, in the strange doctrine of the federal Supreme Court as to the rules of evidence in criminal trials in federal courts, and in the unfortunate rejection by most of our States of the common law as to misdemeanors. Perhaps one may understand the attitude of the seventeenth and early eighteenth-century colonists better, if he tries to imagine a colony to-day founded by Mr. Gompers, and to conceive what such a colony would hold as to the applicability to its condition and situation of American equity. Moreover, the law was backward in England in this period. It was still burdened with the formal thinking and the naïve nominalism of the Middle Ages, and the archaic formalism of which it was not yet rid was persisting into and becoming merged in the formalism of over-refinement characteristic of the seventeenth and eighteenth centuries. Hence it might well "seem to a plain Puritan to be a dark and knavish business." Perhaps the turning-point is the appointment of Lord Mansfield to be Chief Justice in 1756. But Lord Mansfield's great work of ascertaining and incorporating the law merchant and of liberalizing the common law was going on during the Revolution and was not complete at its close. It is noteworthy that he resigned in the same year in which the Constitution of the United States was adopted. The law worthy of reception and the nation to receive it came into existence at the same time.

In spite of the difficulties recited, law had made some

progress in America at the outbreak of the Revolution. There had been a gradual evolution of a judicial system, and in many places there was coming to be a well-trained bar. Doubtless this would have insured a reception and development of the common law. But it happened here, as in seventeenth-century England, that the common law became useful as a political weapon. As Coke had invoked the common law against James I and Charles I, the Continental Congress in 1774 invoked it against George III. Thus a tradition arose that the colonists had brought with them the common law, as a much-prized heritage, and had clung to it and asserted it in the new world. After unquestioned currency for more than half a century, this doctrine has been overturned by study of colonial records and of colonial legislation.

After the Revolution a reaction set in. Economic conditions gave rise to widespread dissatisfaction with law and distrust of lawyers. Political conditions gave rise to distrust of English law. Naturally the public was extremely hostile to England and to all that was English; and it was impossible for the common law to escape the odium of its English origin. Judges and legislators were influenced largely by this popular feeling, and the bar was not strong enough to resist it. In Philadelphia there were a few great lawyers, and there were good lawyers here and there throughout the country. But except in a few centers of legal culture the bulk of the profession was made up of men who had come from the Revolutionary armies or from the halls of the Continental Congress, and had brought with them many bitter feelings and often but scanty knowledge of the law. Alexander Hamilton's preparation for the bar was four months' reading. His less gifted competitors at the bar who came before the courts with the same hasty preparation could not be expected to have much acquaintance with the principles or doctrines of the common law. But the judges were seldom better prepared, and many of them were laymen. A majority of the justices in New Jersey in 1779 were laymen. Of the three justices of the Superior Court of New Hampshire after Independence, one

was a theologian and another a physician. Charles Brayton, judge of the highest court of Rhode Island (1814–18), was a blacksmith, and Isaac Wilbour, a farmer, was Chief Justice of that State from 1819 to 1826. The first Chief Justice of North Carolina was admitted to the bar in 1788 before he was twenty years old. Accordingly, we are not surprised to find the courts of that day resenting any serious investigation of the English books, and endeavoring to palliate their lack of information by a show of patriotism. There is another side. A few great lawyers stand out in this period, but, the country over, the outlook for law, and especially for English law, was anything but bright. It is not too much to say that in the second decade of the nineteenth century, when Judge Story took his seat upon the bench, the work of receiving and adapting the common law and of developing therefrom a system of American law remained yet to do.

It is to the credit of American lawyers that the development of American law in the critical and formative period went forward rapidly and well. While we think of the period as extending for a century, from the Declaration of Independence to 1876, it was in truth less than three-quarters of a century ago. No progress of consequence was made until the appointment of James Kent to be Chief Justice of New York and of John Marshall to be Chief Justice of the United States, at the beginning of the nineteenth century. Moreover, the period of development was substantially at an end at the close of the Civil War. Yet the achievements of this period will compare favorably with those of any period of growth and adjustment in legal history. The closest analogy, both in the time taken and the amount and character of the work accomplished is the classical period in England — the age of Coke. The working over of the civil law in France, which culminated in the writings of Pothier and thence in the Civil Code, went on actively for at least a hundred years. From the first draft of a Prussian code, under the auspices of Frederick the Great, to the taking effect of the Civil Code for the German Empire was a century and a half. And if we begin

only with the rise of the historical school in Germany and the consequent working over of the old judicial materials, we have still more than a century. But in Germany and in France there was abundant modern material at hand, which had been long studied and thoroughly expounded. On the other hand, when Kent went upon the bench in New York he could say with entire truth that "there were no reports or State precedents. The opinions from the bench were *ore tenus*. We had no law of our own and nobody knew what [the law] was." In 1814 Kent became Chancellor. Of his experience as head of the court of equity he tells us: "It is a curious fact that, for the nine years I was in that office, there was not a single decision, opinion, or dictum of either of my predecessors, . . . from 1777 to 1814, cited to me or even suggested." So completely did American law make a new start at the beginning of the nineteenth century!

We all know the result of seventy-five years of American judicature. But it is worthy of note that many obstacles were overcome during that period and that very little would have sufficed more than once to turn the current of our law in a wholly different direction. To some extent this is speculation, but I venture to think that our common law encountered and overcame four very real dangers: (1) The danger of a reception of French law; (2) the danger of a debasement of the law through an untrained judiciary in the earlier part of the century and an elective and to some extent political judiciary after 1848; (3) the danger of premature and crude codification during the legislative reform movement; and (4) the danger of loss of unity and of rise of separate local systems, a danger which once more is becoming acute.

As late as 1856 Sir Henry Maine believed that a reception of French or of Roman-French law was taking place in America. In 1871 he reprinted a lecture containing the statement that the French code, as adopted in Louisiana, and not the common law, was becoming the substratum of the law in the newest States. I have never been sure what he had in mind. Possibly the adoption of the Field Codes

in California and in the Territory of Dakota may have misled him. At any rate, all danger of a reception of French law was over some time before 1856; but at one time it was a real danger.

One who reads the older American reports, particularly those of the State of New York, cannot fail to notice the unusual number of references to the writers and authorities of the civil law which they contain, and the great deference which appears to be paid to such authorities. No less remarkable is the rapid falling off in this practice and practically complete cessation of it by the middle of the nineteenth century. At present, citation of the authorities of the civil law, except in cases involving some point of international law or of admiralty, is usually the merest pedantry, and is seldom indulged in. When in recent years an American judge does see fit to cite them, he does so in the manner of one who is displaying his learning, and not, as many American judges once did, in the same manner in which he cites common-law authorities.

In the first volume of Johnson's Reports, reporting decisions of the Supreme Court of New York and the Court of Errors of New York during the year 1806, Pothier is cited four times, Emerigon five times, Valin three times, Casaregis twice, and Azuni twice. The Institutes of Justinian are cited once. These citations are made by the court. In addition, counsel, so far as their arguments are reported, cite civilians (mostly French) repeatedly. In the seventh volume of the same reports, reporting decisions of the same courts during 1810 and 1811, Pothier is twice cited. Huberus twice, Emerigon once, and the French civil code once. There are also two citations of the Digest, one of the Institutes and one of the Code. Almost all these citations are in cases involving questions of mercantile law. Occasionally, however, the question at issue is one of conflict of laws, and in one case in the fourth volume of Johnson's Reports, Pothier and Justinian's Institutes are cited on a question of damages on a covenant for title. There are also in the early New York reports citations of the civil law on questions of original acquisition of title to property, of

rights as between owners in common, and of quasi-contract. It is noteworthy, too, that when the movement for reform in common-law pleading and procedure arose, whereas in England it resulted in procedure acts and rules of court, in New York and other American jurisdictions following in her wake, it took the form of pretentious codes of civil procedure and ambitious attempts to produce a civil code along French lines.

The reasons of this temporary influence of French law in America were four: (1) the hostility toward England and English institutions that prevailed in the last quarter of the eighteenth century and the early part of the nineteenth century and the feelings of friendship for France on the part of a large portion of the community at the same time; (2) the rise of the law merchant; (3) the influence of Kent and Story, who cited the civil law very freely both in their judicial opinions and in their writings; and (4) the movement for reform in practice and pleading, which created great dissatisfaction with the common law at a time when the effects of the other causes were making themselves felt.

The books are full of illustrations of the hostility toward English law, because it was English, which prevailed early in the nineteenth century. Pennsylvania, New Jersey, and Kentucky legislated against citation of English decisions in the courts, and there was a rule of court against such citations in New Hampshire. Many a judge in other jurisdictions had his fling at the English authorities cited before him. For example, one judge is reported thus: "They would govern us by the common law of England. Common sense is a much safer guide. . . . It is our duty to do justice between the parties! not by any quirks out of Coke and Blackstone, — books that I never read and never will."

At the same time a large and influential party were enthusiastically attached to France, and not only heartily detested things English but were inclined to look more than favorably upon things French. Kent, who became Chief Justice of New York in 1804, says: "I could put my brethren to rout and carry my point by my mysterious wand of French

and civil law. The judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make a fair use of such authorities and thus enrich our commercial law." In another place he says: "English authority did not stand very high in those feverish times." Under such circumstances it is not strange the judges made free use of French authorities to sustain their decisions. But such citation had often a better justification.

The work of incorporating the law merchant into the common law was by no means complete at the time of the Revolution. Lord Mansfield, to whom that result is chiefly, if not entirely, due, was on the bench at that time. But the law which after the Revolution was recognized as "the common law in force at the time of the Revolution" was the common law as it existed before the decisions of Lord Mansfield had settled the principal questions of mercantile law. His decisions and the common-law decisions after his time undoubtedly had a controlling influence in America, as repeated citations of them in Johnson's Reports bear abundant witness. Yet the fact remains that American judges were left more to their own resources in this important department than in any other. Being left largely to their own ideas of what was or should be the law, they naturally looked to the French and Dutch treatises on the civil law and the French treatises on commercial law, and when those treatises conformed to their ideas, cited and approved them. Cases may be found in the Reports in which Pothier was cited by counsel, but the court took a different view upon the basis of English decisions.

Fortunately for our common law, the Anglo-American is averse to authorities in a foreign tongue, as the decadence of French authority in Louisiana bears striking witness, and as the profession advanced in strength and learning and prejudice against English books disappeared, the citation of French treatises dwindled and finally vanished. But at the time when passions aroused by war were passing away, another force began to operate both to discredit the common law and to excite interest in French law.

The school of lawyers who regarded the common law as it stood when Blackstone expounded it as the perfection of reason was giving way to a younger generation, which was bent on pruning it of archaisms and reforming it to suit the spirit of a time which looked askance at everything that savored of the Middle Ages. Political and social institutions as well as legal rules and doctrines were being scrutinized critically on all hands, and English law felt this movement no less than English politics. Bentham, it is true, declaimed against all systems of law impartially. But his disciple, Austin, was acquainted with Roman Law and commended its study. It is noteworthy that the revival of the study of Roman Law in England dates from the movement for reform in the common law. In America the same force was at work, and it was supplemented by the inclination toward French law already in existence. Then, too, men's minds had been fascinated by the Code Napoléon, and in New York, especially, as far back as 1809, we meet with more or less clamor for a civil code on French lines. In the minds of the reformers the want of formal congruity in the common law was contrasted with the order of the systematic treatise of civil-law writers, and they were led to think and speak far worse of their own system than the substance of either body of law warranted. More or less attempt was made to incorporate doctrines of the civil law in projected codes, and here and there a court professed to adopt doctrines of the civilians on some point instead of the common-law rule. But very few American judges and lawyers who would have liked to make use of the civil law were able to do so effectively. Kent and Story practically stood alone. The translations of Pothier were very far from being complete, and were not accessible until the movement had spent itself, and the American edition of Domat was too late to exert much influence. Hence, on the whole, the effects of this movement were no greater than those of the causes already discussed. Judges admired and sometimes quoted the civilians, but they adhered to the common law.

Thus there were few specific permanent results. Courts

cited the civil law to fortify their conclusions. But when their ideas upon new points differed from those of the civilians, they did not hesitate to follow their own. It is clear, therefore, that they were engaged in building up the common law, not in receiving another system in its place. Yet how came it that the common law was able to withstand this formidable invasion? The answer will be more clear after we have considered the other difficulties which our legal system encountered in the first half of the nineteenth century. But I may say here, that if Kent and Story appeared to further a reception of French law by their copious citations of the civilians, in reality they prevented it by presenting what was in substance sound common law in a systematic, orderly, reasoned fashion which appealed to the bar and to the courts.

The second danger, namely, that the common law would be debased and corrupted through administration by an untrained judiciary at the beginning of the century and by an elective and to some extent political judiciary in the last half of the century, contributed to the first. For unless a vigorous body of doctrine could be developed by our courts, a reception of another system or an eighteenth-century code was by no means improbable in view of the state of public feeling with respect to the law. Such a development under the Anglo-American legal system required strong courts. Continental critics refer to ours as a system of judicial empiricism. For the basis of our common law is the idea that experience will afford the most satisfactory foundation for standards of action and for rules of decision; the idea that law is not to be made arbitrarily by a fiat of the sovereign will, but is to be discovered by judicial experience of the rules and principles which in the past have accomplished or have failed to accomplish justice. In such a view not merely the interpretation and application of legal rules, but in a large measure the ascertainment of them, must be left to the disciplined reason of the judges, and we must find our assurance that the judges will be governed by reason, and that the personality of the individual judge will be kept down in the

criticism of the reported decision by bench and bar in the discussion of other causes. Moreover, the strength of the common law is in its treatment of concrete controversies as the strength of the civil law is in its logical development of abstract conceptions. In a comparison of abstract systems the common law is at its worst. On the other hand, wherever the administration of justice is in the hands of common-law judges, their habit of applying to the cause in hand the judicial experience of the past rather than attempting to fit the cause into its exact logical pigeon-hole in an abstract system has gradually prevailed, and has made for slow but persistent invasion of territories once governed by the civil law. Such a process requires that the judges be well guided. Unhappily many jurisdictions had not much more than emerged from the period of lay judges when in 1848 New York took the decisive step of making the judiciary elective. For a time the character of the bench was not greatly changed. But taking the country as a whole, the ultimate result was unfortunate. It is significant that the great names in the American judiciary are almost without exception to be found upon the federal bench or in the earlier courts. The one judge upon the bench of a state court who stands out as a builder of the law since the Civil War, Chief Justice Doe of New Hampshire, held his position by appointment.

Along with the change in the character of the judiciary came a period of legislation and a demand for codification. The latter had been heard indeed in the eighteenth century. In 1774 John Adams said: "How then do we New Englanders derive our laws? I say not from Parliament, not from the common law; but from the law of nature and the compact made with the king in our charter." After the Revolution Jefferson insisted that the colonists had brought with them, not the common law, but the rights of man and the law of nature. Such ideas were dominant upon the Continent of Europe at that time, and the publicists, with whose writings the framers of our constitution were so familiar, were full of them. The jurists of the eighteenth century conceived it to be their task to discover

the first principles of law inherent in nature, to deduce a system from them, and thus to furnish the legislator a model code, the judge a touchstone of sound law, and the citizen an infallible guide to conduct. They had no doubt that a complete code was possible which once for all should provide in advance the one right decision for every possible controversy. Lay discussions of American law in the first quarter of the nineteenth century abound in demands for an American code. Had such men as Kent and Story allowed their good sense to be overcome by the Continental philosophers of law of the eighteenth century, whom they undoubtedly admired, the future of American law might have been very different. I doubt if our judges would have been strong enough to withstand the movement. But when the movement did gather strength in the draft codes of David Dudley Field the common law was thoroughly received and well established and was able to resist it.

Had our law been without unity, had there been a local law for each State, the movement for a premature Bethamite code might well have swept the country as the French codes swept over Europe. To-day, indeed, to use Maitland's phrase, the unity of the common law is precarious. But our jurisdictions have gone too long a way together to draw far apart. Even the huge volume of legislation which is poured forth by our State legislatures is restrained and is brought into some sort of order by a settled common law. Had this flood of statutes been turned upon a system of purely local rules such as we might well have had in the first half of the last century, if not before, at least by now, we should be seeking relief in codes. The attempt of the Supreme Court of the United States to preserve unity by its doctrine as to questions of general law failed wholly. But the same force that preserved the common law from the dangers last discussed preserved it here also. What Story the judge failed in, Story, the text-writer, accomplished triumphantly. For, more than anything else, the books of our great nineteenth-century text-writers saved the common law. Here were guides for judge and practi-

tioner well written, learned, well ordered, and, as things went then, well reasoned. With copious references to the civil law which seemed to make it clear that the resources of comparative law had been exhausted, they stated none the less the common law as worked out in the English courts. Thus at the crucial time the common law was so presented as to make the reception easy, and the energies of judges were turned to the right channel of applying common-law principles to concrete cases. Until our case law was able to stand by itself such aid was indispensable. Without it I doubt if we should live under the common law to-day. As Coke summed up the development prior to his time and thus furnished the basis for a juristic new start, so these text-writers summed up English case law of the seventeenth and eighteenth centuries, and made it available as the basis of a new start in America.

Of the text-writers who accomplished this task of receiving the common law in America two are preëminent, Kent and Story, and Story's work is easily first in quantity and upon the whole in quality. The bare list of his writings speaks for itself:

Commentaries on the Law of Bailments, 1832, nine editions.

Commentaries on the Constitution, 1833, five editions, also translated into French.

Conflict of Law, 1834, eight editions.

Equity Jurisprudence, 1836, thirteen American editions, two English editions.

Equity Pleading, 1838, ten editions.

Commentaries on the Law of Agency, 1839, nine editions.

The Law of Partnership, 1841, seven editions.

Bills of Exchange, 1843, four editions and a German translation.

Promissory Notes, 1845, seven editions.

In quantity, in timeliness, and in its relation to the law that went before and came after, this body of legal writing is in many ways comparable to that of Coke. In each case the judge-made law of the past was restated and was made

conveniently and, as it were, authoritatively available for the future. If in each case there is much to criticise in the details of the performance, the answer is, after all, that this body of writing must be judged as a whole and must be appraised by its results. So judged it must be counted one of the controlling factors in the shaping of American law. Moreover, Story's writings may deceive the casual reader by the apparent weight which is given to the authorities of the civil law. Great as is the use which he seems to make of them, it is in fact almost wholly by way of reinforcement or illustration or example. Where he goes further, as, for instance, in his treatise on bailments, he has had little permanent effect. In substance his books are treatises upon the common law. Moreover, their relation to the civil law happily is to that part of the law where the Romans were at their best and where the common law was least developed.

The genius of the Roman jurist expended itself upon what may be called in a wide sense the law of contractual obligations — upon that part of the law that has to do with recognizing and giving effect to the intention of the parties to legal transactions to create rights and duties, that has to do with the intention implicit in such transactions and the rights and duties annexed by law to the relations to which they give rise. On the other hand, the Roman law of delict was governed to the end by archaic conceptions. I think we may rate it a bit of good fortune, therefore, that neither Kent nor Story tried his hand at the law of torts. Here neither Roman nor civilian had anything for us, and to introduce their specious nomenclature as was done in Scotland could only have bred confusion. Happily judicial empiricism was left free to deal with the details of this subject, and it was left to the twentieth century to work out a theory. The side of the law which called for immediate development when Kent and Story wrote was the very side where help from Roman law was needed; the side upon which Roman law had made an enduring contribution.

Three other points deserve brief notice. Taking them in the order of publication, Story's books upon the Consti-

tution, upon conflict of laws and upon equity have had special influence. If Marshall made our public law, until Professor Thayer caused us to think for ourselves in this connection, to the bench and bar Story authoritatively expounded it. The influence of his book is to be traced through Cooley into nearly all the texts of the last part of the nineteenth century, and for one point he seems to have established the legal tradition as to the colonists and the common law. His treatise upon the conflict of laws is even more important. Dicey says of it that it "forthwith systematized, one might almost say created, a whole branch of the law of England." Professor Gray is no doubt right in saying that the book is Story's "highest claim to reputation as a jurist." But the most important service, it seems to me, was rendered by his writings on equity.

Essential as it is to the working of the Anglo-American system, equity has never been popular in America. To name but one cause the Puritan has always been a consistent and thorough-going opponent. Equity runs counter to all his ideas. It relieves fools who have made bad bargains; and he objects to this, holding that fools should be allowed and required to act freely and then be held for the consequences of their folly. What is even more objectionable to him, it acts directly upon the person. It coerces the individual free will. It acts preventively instead of permitting free action and imposing after the event the penalty contracted for in advance. Again, it involves discretion in its application to concrete cases, and that in the Puritan view means superiority in a magistrate in that it allows him to judge another by a personal standard instead of by an unyielding and universal legal rule. Accordingly, there was vigorous opposition to the court of chancery in England, lasting almost to the eighteenth century. Barebone's Parliament abolished the court of chancery. Massachusetts and Pennsylvania granted equity powers to their courts grudgingly by a process of piecemeal legislation. American state courts have been reluctant to extend the jurisdiction of equity even where the extension involved no more than application of familiar principles to new con-

ditions of fact. The gradual abandonment of equity powers and legalizing of equitable principles in America, which I have ventured on another occasion to call a decadence of equity, is no less significant. The methods and doctrines of equity have not been congenial to our tribunals, and if we remember that the latter have largely been manned with Puritans the reason is obvious.

Had it happened, then, that equity was expounded to American readers by an unfriendly commentator or in the dry and technical fashion of the contemporary English treatises, I venture to think the result would have been most unhappy. As it was, Kent upon the bench and Story in his treatises developed and expounded the subject in quite another way. Kent's was the greater juristic achievement, but I am not certain that we do not owe more to Story. A sympathetic exposition of English equity, referring continually to the civilians and to the Roman law, making it appear, untruly, as we know now, that English equity was essentially Roman law and was a body of universal principles of justice, often comparing the development of the principles in England with that upon the Continent to the disadvantage of the latter, and all this in a most readable form, with an orderly arrangement and a system that at least improved upon what had gone before, was the one thing needed to commend equity to our American courts and to counteract the forces that were working against it. One has but to consider what our administration of justice would be if the majority of our States had been compelled to resort to the shifts and devices to which the courts of Pennsylvania were driven, for want of equity jurisdiction, to perceive the magnitude of the service rendered by such a book. Story seems to have understood the importance of equity in our system from the first, for we find him joining in a petition for the establishment of a court of chancery in Massachusetts at a time when this Commonwealth was persistently hostile to the whole system.

If, as we are told, taught law is tough law, the vitality of the common law is due in large part to this, that it has been taught almost from the beginning. There are other

and more important causes of the vitality which is making it, if it is not such already, a law of the world. But its vitality in the critical period of legal development in nineteenth-century America is due chiefly to this — that it was the only system that was or could be taught to the *juventus cupida legem* with the books at hand in school or office. That it could be so taught and in a way to command enthusiastic adherents is due, above all, to the writings of James Kent and Joseph Story. If Marshall made our public law, they in almost equal measure made our private law in that they assured that it should develop along common-law lines, that it should develop by judicial rather than by legislative empiricism. What the latter would mean the New York code of civil procedure warns us abundantly.

ROSCOE POUND.

CAMBRIDGE, MASS.

NOTE. — On pp. 188, 189, of "Figures of the Past," by Josiah Quincy, who graduated from college in 1821, the following passage appears:

> "I remember my father's graphic account of the rage of the Federalists when 'Joe Story, that country pettifogger, aged thirty-two,' was made a judge of our highest court. He was a bitter Democrat in those days, and had written a Fourth of July oration which was as a red rag to the Federal bull. It was understood that years and responsibilities had greatly modified his opinions, and I happened to be present upon an occasion when the Judge alluded to this early production in a characteristic way. We were dining at Professor Ticknor's, and Mr. Webster was of the party. In a pause of the conversation, Story broke out: 'I was looking over some old papers this morning and found my Fourth of July oration. So I read it through from beginning to end.'
>
> 'Well, sir,' said Webster, in his deep and impressive bass, 'now tell us honestly what you thought of it.'
>
> 'I thought the text very pretty, sir,' replied the Judge; 'but I looked in vain for the notes. *No authorities were stated in the margin.*'"

F. W. G.

THE COMPARATIVE HISTORY OF THE GENERAL REVISIONS OF THE STATUTES OF MASSACHUSETTS IN 1882 AND 1860.

In view of the fact that we are approaching another general revision of the statutes as recommended by His Excellency, the Governor, the following account of two previous revisions, written in 1882 by Jabez Fox, Esq., now Mr. Justice Fox of the Superior Court, and reprinted, by permission, from the *American Law Review* for May, 1882, may interest the bar, as it contains some forgotten history.

On the seventh day of April, 1880, the Massachusetts Legislature passed a resolve providing for the appointment of three commissioners to consolidate and arrange the general statutes of the State, with power to "omit redundant enactments, and those which may have ceased to have any effect or influence on existing rights; reject superfluous words, and condense into as concise and comprehensive a form as is consistent with the will of the Legislature all circuitous, tautological, and ambiguous phraseology; suggest any mistakes, omissions, inconsistencies, and imperfections which may appear in the laws to be consolidated and arranged, and the manner in which they may be corrected, supplied, and amended." It provided that the commissioners should make marginal notes, references to the statutes consolidated, and citations of the "leading and prominent judicial decisions," and "present their final report in print to the Legislature as soon as may be, the same to be accepted or rejected by the Legislature without amendment."

The resolve is precisely like that under which the revision of 1860 was made, with the addition of the clause providing for the rejection or acceptance of the report of the commissioners without amendment. This singular appendage owes its existence to the ardor for retrenchment and economy kindled, as it said, by that arch-reformer, General Butler, which caused such a blaze at the State House in

1879 that even in the following year the embers still smouldered. When the Senate resolve providing for a revision of the statutes came down to the lower branch, the objection of expense was raised, and pressed so effectively, that the House substituted a bill providing simply for a new edition of the statutes at an expense not exceeding five thousand dollars. But the advocates of revision rallied. They argued that three-fourths of the expense of the revision of 1860 had been incurred by the special committee and the extra session, and might just as well be avoided; and, finally, to enforce their argument, they introduced the amendment requiring the report of the commissioners to be rejected or accepted by the Legislature without amendment. With this amendment the resolve passed the House by a small majority. Members of this majority have said that they realized fully that their mandate would have no binding force on a future Legislature, but hoped that its "moral effect" might be good. Its "moral effect" on their own Legislature fully vindicates their good judgment.

On the thirteenth day of April, Charles Allen, Uriel H. Crocker, and James M. Barker were appointed commissioners under the resolve, and began at once upon the revision. The work to be done was, briefly stated, to determine what part of the legislation contained in the twenty-one "Blue Books" from 1860 to 1880, inclusive, was general and still in force, and to incorporate this with so much of the General Statutes as had not been superseded or repealed. By the aid of Crocker's Notes on the Statutes, which had been kept up by the authors, in manuscript, to the latest date, and showed with approximate precision, by references from earlier to later acts, what statutes would have to be brought together, the commissioners were able to begin the actual revision of the laws without delay. As they were required to follow the general plan of the General Statutes, they did their work, as far as possible, by so amending the several chapters of the General Statutes as to express the existing law, although some new subjects of legislation required the addition of wholly new chapters.

They divided the work at the outset into three parts, as

nearly equal as possible, each commissioner submitting the draft of his own part to the critical examination of the others, as it came from the printers in the proof. By availing themselves freely of the facilities of printing, by working generally apart, coming together only when necessary for the settlement of some doubtful or disputed point, and by devoting themselves to the revision to the exclusion of other business, the commissioners were able to disappoint the general expectation, by submitting their report to the Legislature in somewhat less than a year from the date of their appointment.

The commissioners considered themselves constrained, by the clause providing for the acceptance or rejection of their report without amendment, to depart in one respect from the practice of their predecessors. The former commissioners had incorporated in the text of the bill reported such changes in the law as they desired to recommend, calling attention to such changes by footnotes. But the present commissioners, thinking that the Legislature could not be expected to accept without amendment a report embodying substantial changes in the existing law, endeavored to consolidate the law as it was without change.

We have heard some expressions of regret that they did not put a broader construction upon their powers. It has been said, and very truly, that there are many incongruities in our present body of laws, and that to reduce it to anything like a coherent and harmonious system of legislation many changes were needed, which the commissioners were best qualified to make. The weight of opinion, however, seems to approve the more conservative course actually taken. The feeling of security caused by the statement of the commissioners, that "they have not intended to change the substance of the law," is, in the minds of most men, ample compensation for the loss of such improvements as any commissioners, however radical, would have been likely to suggest.

It must be understood, too, that it was plainly within the province of the commissioners to remove positive inconsistencies and to clear up obscurities. They were bound to

put some reasonable construction upon the law, and to express that construction in definite and intelligible form. It will probably be found that, while in theory the commissioners of this and of the former revision worked somewhat differently, there is not much practical difference in the results.

As was to be expected, the greatest difficulties in the revision were due to the defects and inadvertencies of legislation. A single illustration will be enough. St. 1863, Chap. 86, provides that cities and towns may "make by-laws to prevent the falling, and to provide for the removal of snow and ice from the roofs of buildings," etc. St. 1878, Chap. 91, provides that cities and towns may "make by-laws requiring owners of buildings near the lines of streets to erect barriers, or take other suitable measures to prevent the falling of snow and ice from such buildings upon persons travelling on such streets," etc. It became a somewhat perplexing question with the commissioners what particular object the Legislature had in view in passing the second act not effected by the first, and how they should express the entire meaning of both without needless repetition. During the session of the special committee on the revision, however, one of the members admitted that he was responsible for the second act, and that he had prepared it in entire ignorance of the first, and supposing that there had been no legislation on the subject whatever.

It is beside the purposes of this letter to take part in the discussion upon the reason and the remedy for defective legislation. It is plain enough that, in a Legislature two-thirds of which is renewed every year, it is unreasonable to expect that every member who may take it into his head to introduce a bill will have that definite conception of the object to be gained, that accurate understanding of the present state of the law, and that precision in the use of language, which competency in drafting laws necessarily presupposes. No plan for confining the actual preparation of bills to the few persons having the requisite training and skill has yet been devised which seems consistent with our

ideas of the independence of the legislative body and the exact equality of its members.

On the thirty-first day of March, 1881, the commissioners laid their report in print before the Legislature. A joint special committee of thirty-five, subsequently enlarged to forty-seven, had been appointed early in February to consider "so much of the address of his Excellency the Governor as relates to the revision of the statutes." This address had strongly advised the Legislature to get through the work of the revision without a special session. The committee did nothing, however, during the regular session of the Legislature except to provide themselves with interleaved copies of the commissioners' report, in flexible covers beautifully embellished with the names of the committee in gilt. And it soon became apparent that an extra session was determined on, and that a summer's session of the joint special committee must be had. Accordingly, a joint resolution was passed on the thirteenth day of May, requesting the Governor to call an extra session on the second Wednesday of November, and authorizing the committee to sit during the recess.

It is not fair to assume that the Legislature, in coming to this decision, were moved by any other feeling than a disinterested desire for the public good. Their action was at the time quite generally criticised by the press; but there is certainly much force in their claim, that to have accepted the work of the commissioners wholly upon faith would have been an improper surrender of their legislative duties and functions to a commission.

It can certainly be said that the work of revising the report of the commissioners, once resolved upon, was done thoroughly, intelligently, and without unnecessary delay. The report was at the outset apportioned among the several members of the committee for examination. Every chapter was in this way subjected to a thorough scrutiny by one or more members of the committee. The commissioners, or some of them, at the request of the Legislature, attended all the sessions of the committee, and made such explanations or suggestions as seemed to be called for. In the

twenty-three sessions which were held from June 8 to July 13, inclusive, the whole report was taken up and considered, chapter by chapter, and approved, with such amendments as the committee saw fit to adopt.

An order had been passed at the regular session of the Legislature, that in acting upon the report of the commissioners, no amendment attempting a substantial change or modification of existing law should be entertained, except upon a four-fifths vote. The committee, although allowing themselves somewhat greater liberty in making changes than that taken by the commissioners, observed well the spirit of this order, and refrained wholly from any considerable innovations in the law. They heeded carefully the suggestions of the commissioners, seldom insisting on any amendment to which the latter were opposed; and it may safely be said that, while they made some improvements in the correction of errors and removal of obscurities, they did no great harm.

After the adjournment of the committee in July, the report of the commissioners, as amended by the committee, was reprinted and kept in type, to await the action of the Legislature. It was expected that the revision, as reported by the committee, would be adopted by the Legislature without delay, and without substantial change. The committee had been very carefully selected by the Speaker of the House and the President of the Senate with the view of giving to its report the greatest possible influence. The strongest men, and nearly all the talkers in both branches, and of every shade of political opinion, were placed on the committee, with the expectation that their united recommendation would be overpowering. This expectation was not disappointed. The extra session convened November 9, adjourned November 19, having passed the bill for the consolidation of the statutes as reported by its committee with but twenty amendments, all of which were proposed by members of the committee themselves.

There were men in the Legislature who would have been glad to take up the work of law reform. As they expressed it, they wanted to see the revision made so complete and

perfect that there would be no need of another "Blue Book" for twenty years. Just how far we should congratulate ourselves that there was no general disposition on the part of the Legislature to listen to suggestions of this kind we shall never know; but we can vaguely conjecture, when we remember that, notwithstanding the very few changes made at the extra session, it became one of the first duties of the present Legislature to pass an act for the correction of errors made "in the preparation of the Public Statutes for their final passage."

The Public Statutes as enacted, together with glossary, index, and tables showing the disposition of the General Statutes and the general laws passed since 1859, were printed, bound, and ready for distribution on the 1st of March of the present year. Some impatience was exhibited because the statutes were not ready by the 31st of January, when they went into effect; but the fact remains, that the rapidity with which the entire work of the revision was executed is wholly unprecedented, either in this State or any other, and that such despatch would have been impossible if either the commissioners, the Legislature, or the printers had squandered their time.

The time consumed in the revision of the General Statutes from the passage of the resolve providing for the revision to the publication of the statutes was five years and three months; from the beginning to the end of the present revision has been but one year and eleven months.

A comparison of the expense of the two revisions may not be uninteresting. The entire cost of the revision of 1860, including compensation of commissioners, expense of special committees and extra session, printing, paper, press-work, and binding of copies distributed by the State, was $196,529.97. The corresponding expense of the present revision has been something less than $95,000. It seems, therefore, that although the programme originally laid out by the Legislature of 1880 was departed from in some respects, their struggle for greater economy was not wholly unavailing.

Perhaps in no respect can the present revision be con-

trasted so pleasantly with that of 1860 as in the reception accorded to it by the public in general, and by the Legislature in particular. Some errors have been discovered in the report, as was inevitable, but there has been no ill-tempered criticism of it from first to last. The comments of the press have been almost uniformly favorable. The special committee of the Legislature, after working in entire harmony with the commissioners during the recess, arose with the following indorsement of their work:

"*Resolved*, that the committee, after a careful and critical examination of the work, hereby expresses its appreciation of and satisfaction with the intelligent, conscientious, and valuable labors of the commissioners on the revision of the statutes, Messrs. Allen, Crocker, and Barker."

In the year 1859, however, all was different. The report had not left the hands of the commissioners when the *Advertiser* opened the attack upon it with a suggestion that one of the courses open to the Legislature was to reject it altogether, "as an abortion of which no good can come." Then the *Law Reporter* subjected it to a microscopic examination, and in the language of generous forbearance and friendly appreciation assailed it with intemperate severity. The commissioners were not slow to defend themselves against these attacks. Pamphlet was hurled against pamphlet, and the battle furiously raged. The chairman of the special committee on the revision, on taking the chair, referred to the report of the commissioners as "some valuable materials" furnished by the "ministers of an executive under a former administration," for the assistance of the committee in the real work of revision, which was then for the first time to be undertaken.

The temper of this address and the subsequent conduct of the committee rendered it impossible for the commissioners to sit with the committee, as the Legislature had requested. The committee, left to its own devices, made more than three thousand amendments in the commissioners' report. Although most of these amendments were merely verbal, the Legislature did not dare to adopt them, and were finally forced to call in the commissioners to revise the revision of

its own committee. The net result of all this "unpleasantness" was simply a large and unnecessary expense to the State; the cause of it will always remain a mystery. The revision has stood well the test of twenty years' use, and no one would now deny that the commissioners of that time did their work thoroughly, conscientiously, and well. Why, then, were they attacked? Possibly, certain young lawyers of that time were in too great haste to make a reputation. It may be that politics had something to do with it. The commissioners had been appointed in 1855, under the "Know-nothing" administration of Governor Gardner, and there was no party to stand by the work of the "ministers" of that administration in 1859. But, whatever may have been the cause of the outbreak, it was productive of no good, and that a repetition of it has been avoided at the present time is a cause for general congratulation.

JABEZ FOX.

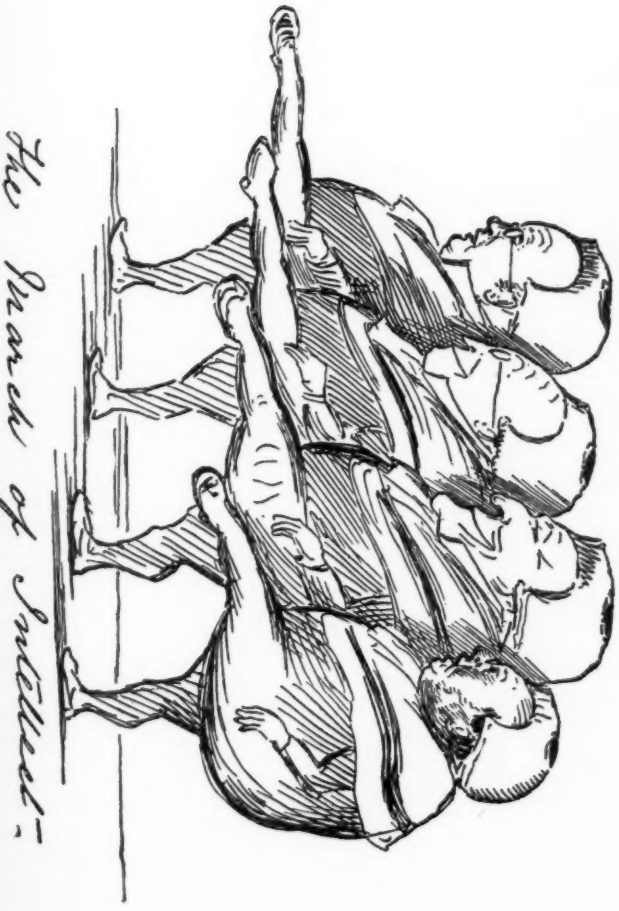
"THE MARCH OF INTELLECT."

(From Augustine Birrell's Biographical Sketch of Sir Frank Lockwood, Pages 57-59.)

"It was during his first year at the bar — the year 1872 — that Lockwood began the habit of drawing in Court, which stuck to him so persistently — in briefs and note-books, when he had briefs and note-books — on casual slips of paper, even on the wood of the desks, rather than not at all. It was by no means an unlucky art. . . . It was produced in the Courts for one thing, the fluttering about of his sketches gave *eclat* to the proceedings — the very judge himself has been known to insist upon their being handed up to him, as if they were documents in the case. All this greased the lumbering wheels of justice, and gave Lockwood from the first a niche of his own.

"The elder judges, who had not grown accustomed to caricature, may have been divided in opinion as to the propriety of Lockwood's pencil, but the younger race has never failed to see the joke.

"Mr. Mellor has kindly allowed the sketch entitled 'The March of Intellect' to be here reproduced. It is undoubtedly one of Lockwood's very best. As one needs to be quite an old fellow to remember this quartette of judges, I may say that the most distant one is Sir Colin Blackburn (afterwards Lord Blackburn), a great case-lawyer; next comes the then Lord Chief Justice of England, Sir Alexander Cockburn, one of the ablest and vainest of mortals; the third is Mr. Justice Mellor, one of the Tichborne judges, and lastly, we notice the somewhat irascible features of Mr. Justice Quain. Mr. Mellor tells me that when he showed this sketch to his father, that eminent judge was greatly delighted, and gleefully exhibited it to his colleagues. The Lord Chief Justice, who believed himself to be a judge of everything, pronounced it exceedingly clever; Mr. Justice Blackburn was willing to believe that people might exist who saw its humor, though he himself did not; Mr. Justice Quain declared the sketch to be both vulgar and impertinent."



The March of Intellect.

THE MEMORIAL TO BE ERECTED AT THE BIRTHPLACE OF CHIEF JUSTICE SHAW IN WEST BARNSTABLE AND THE MEETING OF THE BAR TO BE HELD THERE ON AUGUST 4, 1916.

The father of Chief Justice Shaw was the Rev. Oakes Shaw, the minister of the old West Barnstable Church from 1760 until 1807; and in the old parsonage Chief Justice Shaw was born in 1781. The church from which the original congregation came appears to have been founded in London in 1616. Many of the congregation, including its pastor, Rev. John Lothrop, were arrested for non-conformity in 1632, and, after remaining two years in prison, they were released and about thirty or more of them came across the ocean. Settling first in Scituate for about five years, a majority of them then moved to "Mattakeese," later called Barnstable, in 1639.

In view of the fact that the three-hundredth anniversary of the founding of the church in London is to be observed on August 5 and 6, it seems a fitting opportunity to pay a simple tribute from the bar to Chief Justice Shaw at the time when the interest of many citizens of the state will be attracted to the old house (which is still well preserved), in connection with the proceedings to commemorate the founding of the church in which his father served for so many years. It is felt that many members of the bar would enjoy the opportunity to go down to the old Cape Cod settlement and see the house and place where the Chief Justice grew up.

Accordingly, the Executive Committee of the Massachusetts Bar Association, the Council of the Bar Association of the City of Boston, and the Executive Committee of the Boston University Law School Association, are coöperating in arranging, with the consent of the owner of the property, for the erection of a simple tablet properly inscribed, and for an expedition of those members of the bar who wish to attend the exercises on Friday, August 4, 1916.

It is hoped that Chief Justice Rugg and other distinguished members of the profession will be able to attend, and that interesting addresses will be made appropriate to the occasion.

A detailed notice of the program, with information as to trains and so forth, will be sent out later.

Meanwhile, it will be of some assistance in considering the arrangements if those who read this notice and who expect to attend will notify the committee at the following address.

SHAW MEMORIAL COMMITTEE,
16 Central St., Boston.

NOTES.

GEORGE WASHINGTON'S VIEWS OF THE JUDICIARY.

In the *American Jurist and Law Magazine* for October, 1830, there was published, apparently for the first time, the following letter addressed by George Washington, then serving his first term as President, to Chief Justice Jay and his associates, then about to enter upon their first circuit. As a striking example of simple and concise statement of the judgment of one of the greatest and wisest Americans, it will interest the bar.

"UNITED STATES, April 3d, 1790.

GENTLEMEN: I have always been persuaded that the stability and success of the national government, and consequently the happiness of the people of the United States, would depend, in a considerable degree, on the interpretation of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.

As you are about to commence your first circuit, and many things may occur in such an unexplored field which it would be useful should be known, I think it proper to acquaint you that it will be agreeable to me to receive such information and remarks on this subject as you shall from time to time judge it expedient to make.

GEO. WASHINGTON.

The Chief Justice and Associate Justices of
the Supreme Court of the United States."

THE NEW DEAN OF A GREAT LAW SCHOOL.

Roscoe Pound, Carter Professor of General Jurisprudence, has been appointed Dean of the Harvard Law School to succeed the late Dean, Ezra R. Thayer.

As this appointment is an event of national importance the Committee believe that the bar will be interested to have a brief account of the new Dean, and also to have at hand for convenient reference a list of his writings, in view of the fact that his work has drawn from a distinguished European scholar the description of him as a man "whose legal talents and erudition assure him,

not only in America, but in Europe also, a place among the first scholars of our time."

This is the first time that a man who was not a graduate of Harvard College has been selected as the Dean of the Law School, and it is interesting that this appointment comes coincidently with the decision on the part of the governing bodies of the University to extend to all the graduates of the Law School (whether graduates of Harvard College or not) the right to vote for overseers of the University, thus recognizing the widespread generous atmosphere of the profession.

Dean Pound was born at Lincoln, Nebraska, October 27, 1870. His father was Judge Stephen Bosworth Pound. He graduated from the University of Nebraska in 1888, studied at the Harvard Law School during the year 1889-90 and in the latter year was admitted to the Nebraska bar. From 1890 to 1901 he practised law at Lincoln. For the next two years he served as Commissioner of Appeals for the Supreme Court of Nebraska (this being a temporary position as a member of the Supreme Court). In 1903 he returned to the bar and practised until 1907. From 1899 to 1903 he was assistant professor of law in the Law Department of the University of Nebraska and held the position of Dean from 1903 to 1907. He was appointed professor of law at Northwestern University in Chicago in 1907 and taught there until 1909. For the next year he was a professor in the Law School of the University of Chicago. In 1910 he was appointed Story Professor of Law in the Harvard Law School, and in 1913 was made Carter Professor of General Jurisprudence, which position he has held until the present time.

He was Chairman of the Section of Legal Education of the American Bar Association in 1907; from 1901 to 1907 was Secretary of the Nebraska State Bar Association, and in 1911 was President of the Association of American Law Schools. For some years (1892–1903) he was also Director of the Botanical Survey of Nebraska.

For convenient reference by those who are interested, a list of his legal writings is given below:

1903.

"The evolution of legal education." Inaugural address at University of Nebraska.

"The decadence of equity." 1 Rep. Neb. St. Bar Ass. 152; 5 Columbia L. Rev. 20.

"A new school of jurists." University Studies, Vol. 4, No. 3, July, 1904.

1905.

"Do we need a philosophy of law?" 5 Columbia L. Rev. 339.

"The spirit of the common law." 2 Rep. Neb. St. Bar Ass. 262; 18 Green Bag (1906) 17.

1906.

"The causes of popular dissatisfaction with the administration of justice." 29 Rep. Am. Bar Ass., Pt. 1, 395; 40 Am. L. Rev. 729.

1907.

"Executive justice." 55 (o. s.) Am. L. Register, 137.

"Spurious interpretation." 7 Columbia L. Rev. 379.

"The need of a sociological jurisprudence." 19 Green Bag, 607; 31 Rep. Am. Bar Ass. 911.

"Inherent and acquired difficulties in the administration of punitive justice." 4 Proc. Am. Political Science Ass. 222.

1908.

"Common law and legislation." 21 Harv. L. Rev. 383.

"Legacies on impossible or illegal conditions precedent." 3 Illinois L. Rev. 1.

"Enforcement of law." 20 Green Bag, 401; Proc. Ill. St. Bar Ass., Pt. 2, 81.

"Mechanical jurisprudence." Proc. No. Dak. Bar Ass. 1906–08, 151; 8 Columbia L. Rev. 605.

"Influence of French law in America." 3 Illinois L. Rev. 354; 44 Bulletin Mensuel de la Société de Legislation comparé (1915) 390.

"The etiquette of justice." 3 Proc. Neb. State Bar Ass. 231.

1909.

"Liberty of contract." 18 Yale L. Journ. 454.

"Law in books and law in action." 44 Am. L. Rev. (1910) 12; Trans. Maryland St. Bar Ass. (1909) 298.

"Report of special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation." Presented at meeting of Amer. Bar Ass. August, 1909.

"Uniformity of commercial law on the American continent." 8 Mich. L. Rev. 91.

1910.

"Some principles of procedural reform." 4 Illinois L. Rev. 388, 491.

"A practical program of procedural reform." 22 Green Bag, 438; Proc. Illinois St. Bar Ass. (1910) 373.

"Report of special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation." Presented at meeting of Amer. Bar Ass. August, 1910.

"The law and the people." 3 University of Chicago Magazine, 1.

"Puritanism and the common law." 45 Amer. L. Rev. 811; Proc. Kansas Bar Ass. (1910) 45.

1911.

"Report of special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation." Presented at meeting of Amer. Bar Ass. August, 1911.

1912.

"Democracy and the common law." 18 Case and Comment, 447.

"The scope and purpose of sociological jurisprudence." 24 Harv. L. Rev. 591; 25 Harv. Law Rev. 140, 489.

"Social justice and legal justice." Address before Allegheny Co. Bar Ass. Pittsburgh, 1912, published by association; Proc. Mo. Bar Ass. (1912) 110; 75 Central L. Journ. 455.

"Social problems and the courts." Proc. National Conference of Charities and Correction, Cleveland, Ohio, June, 1912; 18 Amer. Journ. Sociology, 331.

"Taught law." Address before meeting of Ass. Amer. Law Schools, August, 1912; 37 Rep. Amer. Bar Ass. 975.

"Theories of law." 22 Yale L. Journ. 114.

"Legislation as a social function." 7 Publications Amer. Sociological Society, 148.

"Political and economic interpretations of jurisprudence." Proc. Amer. Political Science Ass. 1912.

1913.

"The organization of courts." 22 Philadelphia Legal Intelligencer, iv; Proc. Minnesota St. Bar Ass. (1914) 169.

"The administration of justice in the modern city." 26 Harv. L. Rev. 302.

"The philosophy of law in America." Proc. Conference on Legal and Social Philosophy, 1913; Archiv für Rechts-und Wirthschaftsphiloso-phie, Bd. 7, Hft. 2–3.

"Courts and legislation." 7 Amer. Political Science Rev. 361; 77 Central L. Journ. 219; Proceed. Tennessee Bar Ass. (1912) 74.

"Judicial justice." Address before Colo. St. Bar Ass. (1913) 252; So. Carolina Bar Ass. (1914) 105.

"The lay tradition as to the lawyer." Rep. Rhode Island St. Bar Ass. (1913) 16; 12 Michigan Law Rev. 627.

"Report of special committee to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation." Presented at meeting of Amer. Bar Ass. August, 1913.

"Justice according to law." 13 Columbia L. Rev. 696, 14 Columbia L. Rev. 1, 103.

1914.

"Efficiency in the administration of justice." Preliminary report for the National Economic League, Boston, published by the League.

"The judicial office in the United States." Address before the Worcester County Bar Ass., 1914, published by the Ass.; 20 Proc. Iowa St. Bar Ass. 96.

"Interests of personality." 28 Harv. L. Rev. 343, 445.

"A feudal principle in modern law." International Journ. of Ethics, Vol. 25, No. 1.

"The place of Judge Story in the making of American law." 7 Proc. Cambridge Historical Society, 33; 48 Amer. L. Rev. 676.

"The end of law as developed in legal rules and doctrines." 27 Harv. L. Rev. 195.

"The end of law as developed in juristic thought." 27 Harv. L. Rev. 605.

1915.

"Legal rights." International Journ. of Ethics, Oct., 1915, 92.

"Regulation of judicial procedure by rules of court." 10 Illinois L. Rev. 163.

"Making law and finding law." Address before Ohio St. Bar Ass., 40 Ohio L. Bull. 341.

"Report upon uniformity of laws governing the establishment and regulation of corporations and joint stock companies in the American republics, submitted to the Hon. Wm. G. McAdoo, Chairman, Int. High Comm'n, Pan American Financial Conference."

"Laws and morals." 31 Proc. W. Va. Bar Ass. 187.

1916.

"Vesting in the courts the power to make rules relating to pleading and practice." 2 Amer. Bar Ass. Journ. 46.

"Equitable relief against defamation and injuries to personality." 29 Harv. L. Rev. 640.

A FORGOTTEN ANALYSIS OF A FORGOTTEN INDEX: A WARNING TO FUTURE REVISION COMMISSIONERS.

By the late URIEL H. CROCKER.

(*From the Boston Post of Thursday, February 5, 1891.*)

A WEIGHTY WORK.

THE NEW SUPPLEMENT TO THE PUBLIC STATUTES AND ITS REMARKABLE INDEX.

To the Editor of the Post:

SIR: In May, 1888, a statute was passed providing for the preparation of a Supplement to the Public Statutes, to include all the general law enacted in the years 1882 to 1888, inclusive. . . . The main object of the statute was to give the public these laws in a more accessible and convenient form than that of the seven blue books in which they were already contained. But what has been the result? We have all the laws in one book, it is true, but that book has been made so large and so heavy as to be unsuited for convenient use, and persons of ordinary muscle will probably find it more convenient to continue to consult the old blue books, as they did before. The Public Statutes of 1882, as originally published, made a book as large as is desirable in a book of

frequent reference. This Supplement is, however, nearly half as large again as that book, and nearly half as heavy again. The Public Statutes weigh 5½ pounds, and the Supplement nearly 7¾ pounds.

A short examination of this book discloses how this most unsatisfactory result has been brought about. The size and the weight of the book are in some degree due to the extra margin of blank paper which is bound up with it, but the main cause, both of the delay and of the bulk, is to be found in the extraordinary index with which it is provided. For 830 pages of laws in large type, with a large proportion of the pages taken up by marginal annotations and by the headings of the different chapters, an index of 568 pages of fine type, in double columns and covering the full size of the page, has been provided — an index which, considering the difference in type and page, evidently contains much more matter than the laws to which it refers; an index that ought not to be called an index, but a concordance.

Under these circumstances one becomes curious as to the nature of the contents of this so-called index, and as to the methods by which it has been padded out to its present extraordinary size. A short examination of it has developed some very astonishing peculiarities. The first peculiarity noticed in an examination, which began at the end of the index, was under the title, "*Writing.*" Here were found more than two pages of references to matters that the statutes require to be in "writing;" for instance, "burial permits, statements required for to be in," "cremation rules furnished by health boards to be in," "town auditors' reports to be in," etc. And under "*Writings*" we find "words denoting estatetail in, construed," etc. Is it conceivable that any person would ever look for these matters under the words "*Writing*" or "*Writings*"? Turning back a few pages we find seven references under "*Tenants* in fee," of which the following may serve as specimens: "Armory land, fee in city," "Forest land, fee in State for use of city or town," "Park land, under park act, fee in city or town," "State House extension land, fee in State." What man in his senses would ever look for these matters under "*Tenants*"? Or who would ever look under "*Want*" for a reference to the statute defining how words denoting "want" of issue shall be construed? Again, what possible reason is there for elaborating under "*Teams*" the following details of information: "Used for conveying butterine for sale, to have on outer side name, number of license, and place of business of licensee," "Gothic letters to be used an inch long," "Licenses to be in the names of owners of," "To record

number of," "Sales of butterine not to be from other," "Penalty." Again, under the title "*Rules*" appear to be collected all the cases, fifty in number, in which "rules" of any sort have been mentioned in the statutes — for instance, those "for attendance on evening schools," "for electoral contests by Supreme Court," "for fencing canals or water ways," "for government of Boston Board of Police," "for inspection of oils," "for measuring short lobsters," etc.

Then again, to look at the matter from another point of view, we discover something of the means that have been adopted in order to swell the size of this index, if we examine the space taken up in it by references to Statute 1886, Chapter 340, entitled "An Act concerning the keeping of dogs known as blood-hounds." This act mentions these dogs as known under the names of "blood-hounds," "Cuban blood-hounds," "Siberian blood-hounds," "German mastiffs," "Great Danes," "boar-hounds," and "Ulmer dogs," and consequently we find in the index, not only under "*Dogs*," but also under each of these seven special names for these dogs, a full analysis of the act in seven or more lines of entries, all referring to the same page of the statutes. We also find three references to this act under "*Muzzles*," because the act requires these dogs to be muzzled; four references under "*Forfeitures*," because the keeper of these dogs is liable to a penalty; one reference each (two lines in length) under "*County Treasurer*," "*City Treasurer*," "*Town Treasurer*," and "*Suffolk County*," to show to whom the penalties are to be paid; references under "*Mayor*," "*Selectmen*" (six lines), "*Police officers*" and "*Constables*" (three lines), because the mayor or selectmen may order a police officer or constable to kill such dogs; and references under "*Notice*" and under "*Writing*" because "notice" of such order must be given in "writing." Strangely enough, we do not find any reference in the index to the grand consummation of this dog matter, namely, the "*killing*" of the dog, although under that important word we do find a reference to the fact that for "killing a seal a bounty of $1 is to be paid." How many more references the ingenuity of the compiler of this index may have succeeded in making to a short and unimportant statute, itself only twenty-eight lines long, it is impossible to say. We have succeeded in finding ninety-nine lines of index devoted to these twenty-eight lines of unimportant statute, and enough has been given to show the author's exhaustive treatment of his subject. . . .

U. H. C.

JANUARY 31, 1891.

PROCEDURE AND PRACTICE UNDER THE WORKMEN'S COMPENSATION ACT IN MASSACHUSETTS.

Chief Justice Rugg said in Gould's case,[1] "The Workmen's Compensation Act has a procedure all its own." He points out that one main purpose of the act is to establish a system whereby questions arising between employee and employer as to compensation for injuries received in the course of and arising out of the employment shall be determined forthwith by a public board and the compensation paid by the insurer. "For the accomplishment of these ends a simple method is furnished, operating without delay and unnecessary formality." While the procedure is simple, a short outline of the law relating to it is not out of place since the statute is of recent enactment, and the cases which have required a study of the entire procedure have been few.

The Workmen's Compensation Act requires that every employer shall keep a record of all injuries received by his employees in the course of their employment and make a report, in writing, to the Industrial Accident Board within forty-eight hours after the occurrence thereof on blanks to be procured from the board. This blank contains thirty-one questions, requesting not only the information specifically set out in the act, but also other information required by the board relative to the use of safety devices, etc. Failure to make such a report imposes a fine of not more than fifty dollars for each offense. A supplemental report is required when the employee returns to work. If the employee is disabled for more than sixty days, the employer must report that the employee is still disabled, and upon the termination of such disability must file a final supplemental report.[2]

The mention of these preliminary details is only of interest to show that the Industrial Accident Board should be in possession of rather complete information in every case before any question arises as to compensation and this information may be of some value to the lawyer in preparing his case.

No proceedings for compensation for an injury under the act can be maintained unless a notice of the injury is given the insurer or insured as soon as practicable after the happening thereof, and unless a claim for compensation is made within six months after the occurrence of the injury.[3] The notice is not held invalid or

[1] 215 Mass. 480.

[2] Chap. 751, Acts of 1911, Part III., Sect. 18, as amended by Sect. 1, Chap. 746, Acts of 1913.

[3] In case of the death of employee or if he becomes mentally or physically incapable, the claim must be made within six months after death or the removal of the mental or physical incapacity (Chap. 751, Acts of 1911, Part II., Sect. 15). If the mental incapacity is perma-

insufficient by reason of any inaccuracy in stating the time, place or cause of the injury, unless there was intention to mislead and the insurer was in fact misled. Nor is want of notice a bar to proceedings under the act if it is shown that the insurer, insured, or agent, had knowledge of the injury.[4] A study of the decisions of the board previous to Bloom's case would seem to indicate that the board was not inclined to be technical and that the employee might have compensation even though no notice had been given to the employer, who had no knowledge in fact. Bloom's case holds that notice must be given unless the insurer, insured, or agent, had knowledge.[4a]

The requirements as to the claim for compensation are the same as the notice of injury in respect to the information required and the person by whom it is to be signed. It is to be filed, however, with the Industrial Accident Board, and, according to the rules adopted by the board, a copy of the claim must be sent the insurer.[5] The failure to make a claim within the prescribed period is not held to be a bar to the maintenance of proceedings under this act if it is found that it was occasioned by mistake or other reasonable cause.[6] This last sentence lessens the importance of the claim for compensation.[7]

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nent the employee's rights and privileges may be exercised by a guardian (Chap. 751, Acts of 1911, Part II., Sect. 14). The notice of injury must be in writing, and state the time, place and cause of the injury. It may be signed by the person injured or by a person in his behalf, or in the event of his death by his legal representative or by a person in his behalf, or by a person to whom compensation may be due or by a person in his behalf. The notice of injury may be served on the Insurance Company or upon the employer. If the employer is a corporation it may be served upon any officer or agent. The method of serving is to deliver it to the person, or leave it at his residence or place of business, or send it by registered mail addressed to the person or corporation, at his last known residence or place of business (Chap. 751, Acts of 1911, Part II., Sect. 16 and 17 as amended by Chap. 172, Acts of 1912, and Sect. 8 of Chap. 571, Acts of 1912).

[4] Chap. 751, Acts of 1911, Part II., Sect. 18.

[4a] "Notice must be given and the claim for compensation does not supply its lack. The agent, whose knowledge of the injury excuses the failure to give notice, must be one who acquires such knowledge within the scope of his authority" (Bloom's case, 222 Mass. 434. See also Fierro's case, Department Reports (Boston Herald), Vol. 2, No. 6, page 271; and McLean's case, Department Reports, Vol. 2, No. 5, page 218).

[5] Chap. 751, Acts of 1911, Part II., Sect. 15 and Sect. 23, as amended by Sect. 5 of Chap. 751, Acts of 1912. Rule No. 4 of Rules adopted by the Industrial Accident Board.

[6] Chap. 751, Acts of 1911, Part II., Sect. 23, as amended by Sect. 5 of Chap. 571, Acts of 1912.

[7] In one case the committee said, "The assurance of the Industrial Accident Board that his rights were protected constitute reasonable cause for his failure to make formal claim" (*Sutherland* v. *Contractors' Mutual Liability Insurance Company*, Arbitration No. 2166). In another case the arbitration committee found, "Employee is not barred from prosecuting his claim for compensation by reason of not having filed his claim earlier, said failure being occasioned by mistake, he believed it unnecessary through the negotiation of his employer and that all this amounted to a waiver by the employer of such time limit" (*Dow* v. *City of Newton*, Arbitration No. 1478). Finding approved by full board on review. In another case where the injury occurred on October 21, 1912, and no claim was made until July 6, 1915, the committee held the claimant was not barred because the claim was made within a

The board has adopted a form on which the notice of injury may be given and also a form for the claim for compensation. These forms may be found in the pamphlet issued by the board containing the act.

In the usual accident case where compensation is due, payment is made regardless of any notice of injury or claim on the part of employee. The employee is requested to sign the agreement in regard to compensation in the form adopted by the board. The Insurance Company retains this agreement, and a copy is filed with the board.[8] In some instances the first compensation check accompanies the agreement, while in others the check is not sent until the agreement is signed and returned. If the injured person is a minor, he nominates a person as next friend, and the agreement is signed by that person as next friend, and the checks are made payable to him.[9]

Where the parties fail to agree in regard to compensation, either may ask for the appointment of a Committee of Arbitration.[10] No prescribed form is necessary. Notice to the board of failure to agree is sufficient.[11] Upon receipt of such notice the board requests each party to name an arbitrator, and if either party fails within seven days to do this, the board may fill the vacancy.[12]

A date is set for the hearing, which is held in the city or town where the injury occurred, unless the parties otherwise agree. A member of the board sits as chairman of the committee, and he has the power to subpœna witnesses, administer oaths and to examine such parts of the books and records of the parties to a proceeding as relate to the question in dispute.[13]

Although the board is given this authority, neither the Committee of Arbitration or the Industrial Accident Board is a "court,"

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reasonable time after the practical disability began, which was on April 6, 1915 (*Carroll* v. *American Mutual Liability Insurance Company*, Arbitration No. 2067). In other cases where the question as to the delay in making a claim was raised the committee seems to have passed over the question without any consideration of it (*Cranow* v. *Employers' Liability Assurance Corporation*, Arbitration No. 1841), although in one case compensation was not sought until about eighteen months had elapsed since the date of injury (*Duggan* v. *Massachusetts Employees' Insurance Association*, Arbitration No. 2159). See also Bloom's case, 222 Mass. 434; Fierro's case, Department reports, Vol. 2, No. 6, page 271; and McLean's case, Department reports, Vol. 2, No. 5, page 218.

[8] Rule No. 6 of the Rules adopted by the Industrial Accident Board.

[9] Part II., Sect. 14, Chap. 751, Acts of 1911.

[10] Part III., Sect. 5, Chap. 751, Acts of 1911, as amended by Sect. 9 of Chap. 571, Acts of 1912, and Sect. 9 of Chap. 708, Acts of 1914.

[11] Part III., Sect. 5, Chap. 751, Acts of 1911, and amendment thereto.

[12] Part III., Sect. 6, Chap. 751, Acts of 1911, as amended by Sect. 11 of Chap. 571, Acts of 1912.

[13] Part. III., Sect. 3, Chap. 751, Acts of 1911, as amended by Sect. 8 of Chap. 571, Acts of 1912, and Chapters 123 and 275, General Acts of 1915. Part III., Sect. 7, Chap. 751, Acts of 1911, as amended by Sect. 12 of Chap. 571 of Acts of 1912.

within the strict meaning of the word,[14] and the members are not judicial officers within the meaning of Chapter 3, Article 1 of the Constitution. In Pigeon's case[15] the insurer objected that a declaration of the deceased employee made just before his injury was incompetent since R.L., Chap. 175, Sect. 66, renders such evidence competent only on trial before a "court," but the Court said on page 56, "The power to take testimony and make rulings of law, which are subject to review by the judicial department of the government, goes far to indicate that in performing those functions they are to be guided and controlled by the same general principles which would govern judicial officers in discharging the same duties. . . . The word 'court' has been used in statutes with a broader significance than including simply judicial officers (see *Aldrich* v. *Aldrich*, 8 Met. 102, 106). It may be given a signification liberal enough to include the Committee of Arbitration and Industrial Accident Board as instituted by the act, and under all the circumstances should be given such construction."

A further objection to the admission of the declaration was that a proceeding under the Workmen's Compensation Act is not an action and that the declaration was not made "before the commencement of the action." As to this the Court said, "Here again the definition urged is too narrow. Action is here used in its comprehensive sense as meaning the pursuit of a right in a court of justice without regard to the form of procedure (*Boston* v. *Turner*, 201 Mass. 190, 196). A proceeding under the act contemplates ultimate enforcement in a judicial court, and a declaration made before the institution of proceedings under the act is made before the commencement of the action. The language in *Dickinson* v. *Boston*, 188 Mass. 595, at 597, which seems to imply a restricted meaning, and which is relied on by the insurer, was used in a different connection and with reference to the facts then under consideration. These considerations lead to the conclusion that R.L., Chap. 175, Sect. 66, applies to hearings under the Workmen's Compensation Act. Hence there was no error in receiving evidence as to declarations of the deceased employee."

An interesting question was presented in the Martinelli case as to the power of the Superior Court to issue letters rogatory for the taking of testimony of witnesses in a foreign country to be used in hearings or proceedings brought and pending before the Industrial Accident Board. The Supreme Court held that the power to issue a commission rogatory in order to prevent a failure of justice is inherent in a court, but can only be put forth in aid of a cause

[14] Opinion of Justices, 209 Mass. 606-612. [15] Pigeon's case, 216 Mass. 51.

actually pending in the court which issues the letters, and the proceedings before the Industrial Accident Board are not pending in the Superior Court. It held also that the power was not conferred on the Superior Court by the Workmen's Compensation Act.[16]

The Legislature afterwards gave the Superior Court power to issue commissions, to take deposition, and to issue letters rogatory, as in cases pending in the Superior Court upon a written request, with interrogatories and cross interrogatories being filed by the board with the clerk of the Superior Court for any county.[17]

After the Committee of Arbitration reaches its decision, its findings of facts, rulings of law and other matters pertinent to the questions arising before it, together with a statement of the evidence submitted before it, are filed with the board.

The unsuccessful party in the hearing before the committee may claim a review before the full board; but no party as a matter of right is entitled to a second hearing upon any question of fact.[18] Such hearing on facts may, in the discretion of the board, be allowed and the board may hear any matters of law or other questions pertinent to the case, and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact. It files its decision with the records of the proceedings and notifies the parties thereof. If the claim for review is not made within seven days after the finding of the committee is filed with the board, the decision of the arbitration committee is final; if not obeyed any party in interest may present the finding to the Superior Court, and the finding of the Superior Court thereon is final and may be enforced in the same manner as a judgment.

When a party in interest has presented certified copies of an order or decision of the board, a decision of an arbitration com-

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[16] The Court said, "It is not within the power of a court, even of general jurisdiction, to issue letters rogatory to obtain testimony to be used before a tribunal over whose procedure and trials it is given no authority until the case itself may be brought before it for review. Therefore it is not within the authority of the Superior Court to procure evidence for use before a tribunal over whose proceedings it has no more intimate supervisory power than it has over the Industrial Accident Board." And referring to St. 1912, Chap. 571, Sect. 8, it says, "These words confer no power to issue letters rogatory or to issue commissions to take depositions. It plainly goes no further than to authorize the court to compel the attendance of witnesses within its jurisdiction and to deal with those who refuse to appear and testify. It would have been a simple matter for the Legislature to have conferred upon the Superior Court the additional power here invoked. At all events, it is unprovided for. Although the Workmen's Compensation Act is to be liberally construed, the Court cannot go outside its language for the purpose of assuming a power not granted either expressly or impliedly" (Martinelli's case, 219 Mass. 58).

[17] Chap. 123 and 235, General Acts of 1915.

[18] Part III., Sect. 7, Chap. 751, Acts of 1911, as amended by Sect. 12 of Chap. 571, Acts of 1912; Part III., Sect. 10, Chap. 751, Acts of 1911, as amended by Sect. 13 of Chap. 571, Acts of 1912.

mittee from which no claim for review has been filed within the time allowed, or a memorandum of agreement approved by the board and all papers in connection therewith, to the Superior Court for the county where the injury occurred or for the County of Suffolk, the Court renders a decree which has the same effect, and all proceedings in relation thereto, thereafter, are the same as though the decree was made in a suit duly heard and determined by the Court.

"The only case which can be carried further than the Superior Court, is one which has been reviewed by the Industrial Accident Board and the decision of the board presented to the Superior Court within ten days after the filing thereof by the board. After the Superior Court has entered its decree, an appeal may be taken to the Supreme Court within ten days."[19]

In McPhee's case the dependent of the deceased employee raised the question whether or not the case was rightly before the Supreme Court because of the provision, "that there shall be no appeal from a decree based on an order or decision of the board which has not been presented to the court within ten days after the notice of the filing thereof by the board." The Court says, "This does not mean that the case must be actually brought to the attention of a justice of the Superior Court within that time. It is a compliance with the statute if the required papers are presented to the court in the sense of being filed as a part of its records. The case is here rightly."[20]

The papers presented are copies certified by the board of the findings of the committee or of the board with the evidence upon which they are based and any requests for rulings that parties may have presented.

In one case the insurer presented a petition to the Superior Court together with these certified copies, alleging the interest of the employee, employer and insurer, the date of the decision and the insurer's desire to have determined questions of law set out in the decision. As to this the Court said, "while the section does not require anything more than the bare presentation of copies of

[19] Sect. 11, Part III., Chap. 751, Acts of 1911, as amended by Sect. 14 of Chap. 571, Acts of 1912. Hunnewell's case, 220 Mass. 351. In Hazel Young's case, 218 Mass. 346, the employee attempted to appeal from the decree of the Superior Court based on the decision of the arbitration committee. "This is a provision obviously intended for the benefit of the employee to prevent any delay in receipt by him of compensation. The machinery of the act is first a decision by the arbitration committee. If there is any dissatisfaction with this, the next step is a review by the Industrial Accident Board. If no such review is insisted upon, then there can be no further controversy on the facts, and the Superior Court, unless there is legal reason to the contrary, must enforce the award so made. The express provision of the act is that there shall be no appeal. In case of errors of law apparent on the face of the record they may be corrected by certiorari, or perhaps by some other appropriate remedy."

[20] McPhee's Case, 222 Mass. 1.

the designated proceedings of the Industrial Accident Board, it is not improper that a petition be filed, setting forth briefly the nature of the questions to be decided." [21] It would seem that this would be useful even though unnecessary practice.

The Superior Court hears the case appealed to it from the board on the facts certified to it on the papers and enters such decree as the law requires upon them. Thus the Court may enter a decree different from the board's finding. In the McNicol case [22] the Committee of Arbitration found that compensation should be divided equally between the widow and the dependent minor daughter, but upon review the Industrial Accident Board found that the widow alone was entitled to payment. The Superior Court, exercising its judicial function, entered a decree sustaining the finding of the Committee of Arbitration. The Supreme Court upheld the Court's right to do this, although the decree was reversed on the ground that the decree of the Industrial Accident Board was right. On page 502 the Court says, "Part III., Sect. 11, of the act, as amended by St. 1912, Chap. 571, Sect. 14, provides that when copies of the 'decision of the board . . . and all papers in connection therewith' have been transmitted to the Superior Court, 'said court shall render a decree in accordance therewith.' This means such a decree as the law requires upon the facts found by the board. It does not make the action of the Superior Court a mere perfunctory registration of approval of the 'conclusions' of law reached by the Industrial Accident Board. The section in question doubtless was enacted because of the intimation in the Opinion of the Justices, 209 Mass. 606, 612, to the effect that the decisions of the board must be enforced by appropriate proceedings in court. The obligation placed upon the Superior Court by the requirement to enter a decree in accordance with the decision is to exercise its judicial function by entering such decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record."

The method of taking a case to the Supreme Court is by appeal, and by appeal only.[23] In Gould's case there was an appeal and the judge also allowed a bill of exceptions, stating that it was for the purpose of enabling the Supreme Court to determine the proper manner of bringing before it proceedings of this sort. On page 481 of this case Judge Rugg discusses very thoroughly this question and

[21] Gould's case, 215 Mass. 480.

[22] McNicol case, 215 Mass. 497.

[23] Gould's case, 215 Mass. 480, and McNicol's case, 215 Mass. 497; Cripp's case, 216 Mass. 536; Pigeon's case, 216 Mass. 51.

reaches the conclusion that because of the phraseology employed, the beneficent purpose of the act, and the character of the proceedings, causes under the act in court should be treated as equitable rather than legal in nature, procedure, and final disposition. He says, "The act provides only for an appeal, and makes no reference to exceptions. Although exceptions are permitted in our system of equity, that is a statutory engraftment, not according to general chancery procedure, and appeal is simpler and on all grounds better practice. But when exceptions are taken, there can be no final decree until exceptions are disposed of. The present act, however, requires a decree, which in the ordinary case must be final in its nature, to be entered by the Superior Court. This precludes the possibility of exceptions. It follows that the suit must be brought here by appeal from the decree of the Superior Court, and not by exceptions. As exceptions could not be allowed legally, the case is here rightly on appeal."

In order that questions as to the admissibility of evidence before the Committee of Arbitration or before the board may be considered by the Supreme Court, objection must be made when the evidence is received.[24] The Supreme Court in this regard again points out that practice under the Workmen's Compensation Act follows that prevailing in equity and that the general practice in equity outside the Commonwealth is to consider on appeal questions properly raised as to the admission or exclusion of evidence. The Court says, "As exceptions do not lie under the Workmen's Compensation Act, and the only way to bring questions of law to this court is by appeal, it follows that the general equity rule as to consideration of questions of evidence raised at a hearing before the chancellor ought to be followed. Such questions seasonably presented upon the record will be considered, but a decree will not be reversed for error in this respect unless the substantial rights of the parties appear to have been affected."

The same weight is to be given the findings of the Industrial Accident Board as is given the findings of a single justice or the verdict of a jury. They are not to be set aside if there is any evidence upon which they can rest.[25]

The question whether as a matter of law there is any evidence upon which the finding could be made can only be considered by the Supreme Court when all the material evidence has been

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[24] Pigeon's case, 216 Mass. 51; Duprey's case, 219 Mass. 189.

[25] Donavan's case, 217 Mass. 76; Meley's case, 219 Mass. 136; Septimo's case, 219 Mass. 430; Pigeon's case, 216 Mass. 51; Diaz's case, 217 Mass. 36; Herrick's case, 217 Mass. 111; Burn's case, 218 Mass. 8; Young's case, 218 Mass. 346; Nickerson's case, 218 Mass. 158; Bentley's case, 217 Mass. 79; Savage's case, 222 Mass. 205; Duprey's case, 219 Mass. 189.

reported.[26] In many of the cases it appears either that all the evidence has not been reported or that the record does not clearly enough indicate that all the evidence is reported to warrant the Supreme Court in considering the question. It becomes important, therefore, for the appellant to make sure that it appears that all the evidence is reported, and in a case where the board on review has not confined itself to evidence reported to it by the Committee of Arbitration, to also make *it clear on the record* that all the evidence upon which the Industrial Accident Board made its finding is before the Court. In Brightman's Case[27] the Court held that where the board confined itself in review to matters reported to it by the Committee of Arbitration, "It must be assumed that the Committee of Arbitration performed its duty and reported all the material evidence. The procedure in this respect differs from that on exceptions from the Superior Court, where, if the sufficiency of the evidence to support the verdict or finding is raised, it must appear that the material evidence is set forth. The positive duty resting on the Committee of Arbitration to report all material evidence supplies the absence of the express statement required in a bill of exceptions. It follows that it is open to the insurer to argue that the findings are not supported by the evidence reported." Also, "It seems from the record and the course of the argument in this court that no evidence was received by the Industrial Accident Board, but that its hearing was confined in this respect to the matters reported by the Committee of Arbitration. The finding and decision of the Industrial Accident Board is not explicit in this respect. It would be desirable to have the fact stated definitely in order that occasion for doubt may be removed in future cases. But we feel warranted in making that assumption in the case at bar for the reasons stated."

Where, however, the record shows that the Industrial Accident

[26] "The findings of fact thus made are not open to revision as such. Nor as the evidence is not reported, can it be contended as a matter of law they were not warranted" (Bentley's case, 217 Mass. 79). "When, however, as here, all the material evidence is reported, it may become a question of law whether there was any evidence upon which the finding could have been made" (Herrick's case, 217 Mass. 111). "There is no appeal from the finding of the board upon a question of fact where there is any evidence to support it; but where, as here, the evidence is all reported the question whether it is sufficient to support the findings is one of law and may be revised here" (Buckley's case, 218 Mass. 354). "The finding must stand as the evidence upon which it was based is not reported" (Young's case, 218 Mass. 346). "We are of the opinion that the finding of total disability was warranted, if we assume that all the evidence is reported, although this does not appear clearly" (Duprey's case, 219 Mass. 189). Where only excerpts from the transcript of the evidence were contained in the record the Court said, "It was impossible to say as a matter of law that there was no evidence to warrant the finding" (Arthur King's case, 220 Mass. 290). "As all the material evidence is reported this contention is open" (George T. Fisher's case, 220 Mass. 581).

[27] Brightman's case, 220 Mass. 17.

Board heard the parties and also affirmed and adopted the finding of the Committee of Arbitration, and may therefore have made an independent investigation or heard evidence other than that submitted to the committee, it cannot be assumed that all the evidence upon which the Industrial Accident Board made its finding and decision is before the Court in the absence of any statement on the record to that effect.[28]

It is the duty of the board to report all the evidence, but owing to the informality of the proceedings and the fact that the evidence is seldom written out in full, a complete record is not always easy to obtain. In case of the omission or the refusal of the board to report evidence which a party deems material, no remedy is provided in the act, and the procedure is uncertain. Before the case is entered in the Superior Court, it is probable that the Court has no power to entertain a motion to correct or amplify the board's report,[29] though if the case has been entered, such motion and order could be made.[30] Possibly certiorari would lie.[31] Possibly the party aggrieved might make a petition to the board, setting forth the matter and then appeal from its order, entering the papers in the Superior Court, which would then have power to hear the facts and give such direction to the board as might be required.[32]

The burden of proof rests on the claimant in a case under the Workmen's Compensation Act as it does upon a plaintiff in any proceeding at law. On this point the Court said in Sponatski's case, "The dependents must do more than simply show a state of facts which is equally consistent with no right to compensation as it is with such right. They can no more prevail if factors necessary to support the claim are left to surmise, conjecture, guess or speculation, than can a plaintiff in the ordinary action in tort or contract. A sure foundation must be laid by a preponderance of evidence in support of the claim, before the dependents can succeed. The elements that need to be proved are quite

[28] In Stickney's case the report of the Committee of Arbitration stated that "the material testimony was substantially as follows." The Industrial Accident Board recites in its decision that "it heard the parties" and also that it "affirms and adopts the findings of the Committee of Arbitration." The insurer stated in its briefs that the decision of the board was based upon the facts found by the Committee of Arbitration, but the employee contended that all the evidence before the board was not reported by the board and was not before the Court. The Supreme Court said, "We cannot assume that all the evidence upon which the Industrial Accident board made its finding and decision is before us in the absence of any statement on the record to that effect" (219 Mass. 513).

[29] Martinelli's case, 219 Mass. 58.

[30] Doherty's case, 222 Mass. 98.

[31] Hazel Young's case, 218 Mass. 346.

[32] Acts of 1912, Chap. 571, Sects. 14 and 15.

different from those in the ordinary action at law or suit in equity, but so far as these elements are essential, they must be proved by the same degree of probative evidence." [33]

It is to be noted that while the act says there is no appeal from the decree where it is based upon a decision of the arbitration committee or a memorandum of agreement or no appeal from a decision of the board unless taken within the prescribed time, this does not mean that the decree is then in its final form, for a certified copy of a decision of the board ending, diminishing or increasing a weekly payment may be presented to the Court, and the Court then revokes or modifies its decree to conform to such decision.[34]

A recent statute provides that, "An order or decision of the Industrial Accident Board, a decree of the Superior Court upon such an order, a decision of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the Industrial Accident Board, shall have effect, notwithstanding an appeal, until it is otherwise ordered by a justice of the Supreme Judicial Court, who may, in any county, suspend or modify such decree, order or decision, during the pendency of the appeal." [35]

This statute can only act in cases appealed from the Superior Court, and therefore does not affect a decree by the Superior Court based on the decision of an arbitration committee from which no claim has been filed, or from a decree based on a memorandum of agreement approved by the board.

Where an appeal is taken from a decree of the Superior Court it may well happen that the whole compensation would have been paid before the question could be considered by the Supreme Court, unless a justice of the Supreme Court suspended the payment. If the payment is not suspended and the finding of the board is reversed in the Supreme Court, the insurer has nothing but a claim against the injured man, which in most cases would be valueless. Such a case as this would render the right to appeal worthless.

Undoubtedly circumstances such as these would be sufficient ground for the justice to suspend the decree or to require that the employee give a bond to protect the insurer should he prevail. There seems to be no valid reason why the Court cannot or should not order such security, since, as we have seen, the proceedings are equitable in their nature. The intention of the Legislature in

[33] Sponatski's case, 220 Mass. 526; Arthur King's case, 220 Mass. 290.

[34] Part III., Sect. 11, Chap. 751, Acts of 1911, as amended by Sect. 14 of Chap. 571, Acts of 1913; Part III., Sect. 12, as amended by Sect. 11, Chap. 708, Acts of 1914.

[35] Chap. 132, General Acts of 1915.

framing this amendment, evidently, was to cover a case where, up to the date of the finding, a certain sum was due absolutely and where the questions contested had to do with future payments. To withhold payment of this money until the case had been through the Supreme Court would be a hardship. It does not seem reasonable to suppose that the Legislature in removing a hardship on the employee intended to impose various hardships on the insurer.

Costs do not follow the decision in a case under the act, but each party bears his own. The arbitrator's fees are paid by the Insurance Company, which deducts an amount equal to one-third of this sum from any compensation found due the employee.[36] Where a decision of an arbitration committee or of the board or a memorandum of agreement approved by the board is filed in the Superior Court for the purpose of having a decree entered, an entry fee of $3 is charged. The act has no provision for taxable costs.

No entry fee is charged, however, where a request is filed by the board with the Superior Court that the Court issue a commission to take deposition or issue letters rogatory.[37]

If, in the opinion of the Committee of Arbitration, the board, or any court before which any proceedings are brought under the act, the proceedings were brought, prosecuted or defended without reasonable ground, the whole cost of the proceeding shall be assessed on the party so acting.[38]

Where there is an appeal taken to the Supreme Court, and the decision is in favor of the employee or his dependents, it is provided that interest to the date of payment must be paid by the insurer on all sums due as compensation.[39] Nothing is said as to the date from which interest is to be paid, but it seems logical that it should be paid from the date of the decree of the Superior Court.

An entry fee of $3 is charged upon an appeal to the Supreme Court.

FREDERICK A. CARROLL.

WORCESTER, MASS.

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[36] Part III., Sect. 9, Chap. 751, Acts of 1911.

[37] Part III., Sect. 3, Chap. 751, Acts of 1911, as amended by Sect. 8 of Chap. 571, Acts of 1912, and Chap. 123 and 275, General Acts of 1915.

[38] Part III., Sect. 14, Chap. 751, Acts of 1911.

[39] Sect. 14, Chap. 708, Acts of 1914.

THE POSITION OF THE LEGAL AID SOCIETY IN THE ADMINISTRATION OF JUSTICE.

(Reprinted from the 15th Annual Report of the Boston Legal Aid Society.)

Freedom of Justice in Principle.

Since Magna Carta Anglo-Saxon political philosophy has cherished freedom of justice and equality before the law as two of its cardinal principles. In the fortieth paragraph of the Great Charter it was inscribed "*nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam;*" and this proposition, enunciated in similar words by our colonial Bills of Rights, the Declaration of Independence, and the Massachusetts Constitution — which reads "every subject of the Commonwealth ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay" — has become a deep-rooted tenet of our traditional American political faith. It has been constantly emphasized by our historical and juristic writers that these two principles, which, indeed, are in substance one, are as essential to a democratic state as equality of suffrage, freedom of speech, or individual liberty. It has been repeatedly stated and proved that the denial of justice to any portion of the people, no matter how humble, was the short cut to anarchy. All this we have accepted, and because the State has created courts, enacted laws, built courthouses, and paid judges' salaries, we have believed that we were living up to our creed, and that all was well in the administration of justice.

Denial of Justice in Practice.

Towards the end of the nineteenth century certain indications of dissatisfaction with our judicial and legal system manifested themselves, murmurs of protest began to be heard, and these mutterings, gathering in intensity and force, especially in our large cities, finally broke into the articulate cry that rank injustice was being done. To-day we are face to face with disquieting facts that can no longer be denied and which no longer need even be proved to any person cognizant of existing conditions. The facts, summarily stated, are these: that the rich and the poor do not stand on an equality before the law, and that we have developed a system of justice which in practical operation results in an absolute denial of justice to millions of people. As analyzed by the recent United States Commission on Industrial Relations, there are four main sources from which our industrial unrest springs, and of them the third is "denial of justice in the creation, in the adjudication and in the administration of law."

It is a common assumption that the denial of justice has a purely negative effect, that its result is merely to prevent some few persons from going to court to collect money which they believe is due them. Nothing can be farther from the truth. The law is all-embracing; properly enforced, it protects the savings of a lifetime, it controls the relationships of husbands and wives, it guarantees the title to the land and house which mean a home, it watches over the welfare of little children. Denial of justice means that the savings may be swept away, that a husband may cruelly abuse his wife with impunity, that the home may be destroyed through illegal foreclosure, and parents robbed of their children by fraudulent guardianship proceedings. All these things can be done, and have been done, for in the hands of unscrupulous persons, when used against persons too poor or too ignorant to protect their rights, the law is the most powerful and the most ruthless weapon ever invented.

Analysis of the Difficulty.

Already many different plans for the bettering of the judicial system have been suggested, and some, having been adopted by the State and Federal governments, are already in operation. But before these experiments can be intelligently appreciated or criticised it is necessary to analyze, as clearly as may be, the factors which have brought about this breakdown of our judicial machinery.

It seems to be the consensus of opinion that the main body of the law — that law which regulates the interests, obligations, relationships of individuals to each other and to the State — is healthy and sound; that while the law lags behind in certain directions it also, in other directions, already sets standards of conduct in advance of the present moral sense of the community; and that while it is grappling with enormous problems, some of which are still to be solved, it is, on the whole, a reasonably satisfactory human achievement. This view is resolutely maintained by such men as Roscoe Pound, Dean Wigmore, and ex-President Taft.

Antiquated Procedure the First Difficulty.

The difficulties are not so much with the law itself as with the way in which law is enforced. The judicial machinery is failing because its procedural cogs have become antiquated and because it requires so much financial lubrication. Mere procedural obstacles are not fundamental, and there is every reason to believe that the commissions of judges and lawyers who are now studying the matter will find suitable remedies. The question of the expense involved in litigation is more formidable.

Analysis of the Question of Expense.

This problem of expense has received its classic analysis at the hands of ex-President Taft, who divides it into these three constituent elements: the expense entailed in delays and appeals, the expense of court costs, and the expense of employing an attorney. A correction of procedure implies the reduction of delays and appeals to a minimum, so that with the attainment of proper procedural rules the first of these elements will disappear.

Court Costs the Second Difficulty.

Court costs, though insignificant in cases of magnitude, in small cases are prohibitive. Laymen often do not realize that it costs about three dollars just to begin a simple suit in an inferior court, five dollars in the Superior Court, and from two to ten dollars more if any attachment of property is to be made. When an employee is not paid his wages he obviously has no money, he cannot pay the court costs, and therefore cannot sue to recover his wages. It is indeed a vicious circle, and within that circle thousands of unpaid wage-earners have been caught. For them there is no law. As a case progresses, there are other and greater costs, especially in appeals; but it is these initial costs which are of prime importance because they literally shut the doors of our courts in the faces of the poor. These court costs, although they are the cause of much injustice, do not present any fundamental difficulty because they can be done away with. For years in New York and Missouri the complaint *in forma pauperis* has allowed poor persons to present their cases without expense. In the Federal courts there is a similar provision, notably in seamen's cases. The newly created Court of Conciliation in Cleveland and the Small Debtor's Court in Kansas have shown that no injustice results from having the defendant notified to appear in court by a registered letter instead of by a sheriff at a cost of two dollars, or from summoning witnesses by telephone instead of by subpœnas served by sheriffs. Courts costs can be abolished in Massachusetts whenever the Legislature desires it, and it is encouraging to observe that in 1915 it was enacted that certain probate court citations could be served by registered letter. So far as the State is concerned, there is no inherent reason why justice cannot be put on the free list with religion, health, and education.

Expense of Counsel the Fundamental Difficulty.

The third element of expense arises from the necessity of employing an attorney, and it is here that the truly fundamental difficulty is encountered. It is fundamental because the trained advocate has become an inherent part of our

judicial machinery. It is not easy in few words to convey a true impression of the enormous importance of the attorney in our system of achieving justice, but the mention of the broad outlines of his work is very suggestive. He must start the case properly by satisfying all requirements of venue, jurisdiction, service, entry, and the law of pleadings. When the case is before the Court our system contemplates the doing of justice by applying general laws to the facts of the particular case. In many cases the attorney must be ready to assist the Court in determining the law applicable, and in every case he must have ascertained the facts by investigation, must have selected the material facts admissible according to the law of evidence, must have the witnesses and documents at hand, and must present the case in accordance with the rules governing trials. When judgment is rendered he must transform that into an execution, and finally undertake to satisfy such execution by levy on the defendant's property. At every stage the attorney supplies the motive power; without him the judicial machinery would never move.

Legal Abolition of the Attorney.

Delays and costs can be abolished by legislative fiat, but so long as the trained professional advocate remains the keystone of our judicial structure he cannot be removed. It has been officially attempted in Kansas, where the statute creating the small debtor's courts expressly states that attorneys shall not "intermeddle." Even if the experiment is successful it can never be carried beyond the narrow limitations of certain types of cases, so that it contains but small promise of being the true solution for a difficulty which inevitably arises, not merely in certain cases, but in every conceivable kind of a judicial proceeding.

Administrative Officials instead of Private Attorneys.

A second and much better plan is that which aims not to outlaw the attorney but to remove the need for his services. This movement has assumed national proportions, and certain outstanding examples of it are to be found in Massachusetts. Our non-support and desertion law has been so simplified that a wife may obtain full redress through the agency of the court probation officers, who are perfectly competent to conduct the average case. The creation of a State Supervisor of Loan Agencies has substantially done away with the need of going to law to straighten out a small loan tangle. The enactment of a statute making non-payment of wages a criminal offense, and the establishment of the State Board of Labor and Industries to enforce the law, has put a stop to the wholesale non-payment of

wages, with all the litigation arising therefrom, which still obtains in some States. That the need for the services of an attorney has actually been removed may readily be seen from the fact that, whereas in Kansas City, New York, and Chicago, over thirty per cent of all the cases referred to the legal aid societies are wage claims, in Boston complaints for non-payment of wages amount to only eleven per cent, and most of these are for the wages of domestic servants, who are not included within the protection of the criminal statute.

The Limitations of Administrative Justice.

All these experiments designed to remove the need for an attorney have achieved substantial success. But if this conception is to be the final solution of the problem it must be capable of such development as to remove the need for an attorney in every kind of judicial proceeding, and that it never can attain. On analysis it is apparent that the plan has succeeded in those fields of law which admit of administrative, in distinction to judicial, treatment. Wherever the law can be reduced to simple terms and the cases arising thereunder present no peculiar difficulties, justice can adequately be secured by a competent executive officer, without the intervention of any attorney; but beyond these limits executive justice cannot safely be extended. A striking illustration of this is afforded by our Workmen's Compensation Act, which by abolishing all the common-law negligence doctrines and by substituting a fixed scale of compensation for the intangible common-law damages, has reduced much of this branch of tort law to clear and simple terms. The act, and the Industrial Accident Board which enforces it, are essentially administrative, but are partly judicial, in nature. The judicial aspect appears whenever a case presents a sharp conflict of testimony or raises a complicated question of law which calls for a delicate weighing of facts and arguments and a decision thereon. Immediately in these cases the need for an attorney is felt. Obviously the board cannot itself secure the evidence, brief the law, present the facts, and argue the case with whole-hearted zeal and at the same time decide the case with judicial impartiality. The injured employee is not competent to present his case adequately, and so resort necessarily is had to the attorney.

The Problem of Supplying Counsel Gratuitously.

The problem of securing freedom of justice to the poor resolves itself into a question of avoiding the expense of the attorney. The two plans which have been considered both aim to evade the expense by dispensing with the

attorney; the first is doomed to failure because it takes no account of, and therefore is inconsistent with, our existing judicial system, and the second, at its best, is inherently so restricted as to be a solution for only a fractional part of the difficulty. The remaining alternative is to retain the attorney, but to eliminate the expense by furnishing counsel to the poor gratuitously. Such a plan, if practicable, is fundamentally sound because it does reckon with the nature of our machinery for securing justice and it recognizes that the attorney is an essential part of most judicial proceedings. The specific question therefore becomes, How can the poor be provided counsel as a matter of right and without charge?

Legal Aid Societies of the United States.

The legal aid societies of the United States are an answer to this question. They face the problem squarely, and already they have solved it to this extent: they have furnished counsel in 658,563 cases; they have collected for clients sums aggregating $2,448,926.70; and to accomplish these ends they have expended $816,151.11.

In this chain of closely allied organizations, stretching from coast to coast, lies the greatest hope for any immediate realization of our ideal of freedom of justice. When one considers that the legal aid idea, springing as recently as 1876 from one small struggling society in New York, has already developed into not only a national, but an international institution, it is difficult to foretell or even guess at what the influence and scope of these societies may be within ten years. Sometimes figures are more impressive than words, and the following are submitted to attest the growth of the work according to accurately known statistics.

Year.	Number of Societies in the United States.	Clients Represented.	Amounts Recovered for Clients.
1876	1	212	$1,000.00
1888	1	3,315	14,624.28
1900	2	14,365	97,290.19
1910	13	41,666	116,256.57
1912	22	61,186	173,675.42
1914	36	87,061	214,949.69

In 1915, 44 definitely organized societies were in existence and 27 others were in process of formation.

The History of Legal Aid.

In order to understand the fundamental idea which the legal aid society has developed, it is necessary to know something of its history. Early in the year 1876 a few American citizens of German birth met at the office of ex-Governor Salomon of New York for the purpose of coöperating with the New York "German Society" in protecting German immigrants from boarding-house sharks and other plunderers. The little group incorporated under the title "*Der Deutsche Rechtsschutz Verein*," and opened an office at 39 Nassau Street. From the outset, emphasis was laid on the fact that the object of the society was not to dispense charity but to secure justice, and on collections a small commission was charged. For fourteen years the work was primarily for Germans, all reports were published in German, and The German Society defrayed a part of the expenses.

By 1890 it became apparent that the founders had builded better than they knew, and that they were standing at the threshold of a great opportunity. In that year thirty per cent of the applicants for legal assistance were not Germans, and this percentage yearly increased. In accordance with the far-seeing vision of its president, Arthur von Briesen, the society in 1896 officially flung open its doors to all the poor and oppressed of the city, became the Legal Aid Society of New York, and announced "the purpose of this society shall be to render legal aid, gratuitously if necessary, to all who may appear worthy thereof, and who are unable to procure assistance elsewhere, and to promote measures for their protection."

Development of the Idea.

Until 1900 the history of legal aid work is the story of the development of the New York Society, but by the beginning of the new century the idea had spread and was taking root elsewhere. In Boston, a group of sixteen prominent attorneys, finding that numbers of persons were applying to the Bar Association for relief, and that there was no effective way of aiding them, adopted the New York idea and organized the Boston Legal Aid Society. At about the same time in Newark the New Jersey Legal Aid Society was formed. Next in line were New Rochelle (1902) and Philadelphia (1903). In 1905 two strong societies were formed in Chicago and Cleveland. By 1909, Pittsburgh, Cleveland, Los Angeles, and Detroit had been added.

Municipal Legal Aid Societies.

All of these societies were substantially the same: all but two were organized as private charitable corporations, and every one financed its work from contributions made by members of the

bar and other members of the charitable public who were interested in the work. But in 1910 an innovation of far-reaching effect, the end of which is not yet in sight, was made in Kansas City. That enterprising city had established a Board of Public Welfare, and the board decided that justice was just as much a matter of public welfare as the inspection of dance halls, the maintenance of a municipal farm, or providing homes for the homeless. Accordingly, under its general authority and without any express statutory provision, it organized a Bureau of Legal Aid which from the very beginning has flourished amazingly. In four years it has become the fourth society in size in the country, being outranked only by New York, Chicago, and Los Angeles with its Public Defender. In 1914 this municipal legal aid society handled 6,573 cases.

Significance of Public Legal Aid.

The importance of this development may easily be appreciated. It is the first conscious attempt of any American community to live up to its creed of freedom of justice. It recognizes that the attorney is an integral part of our system of justice, and therefore proposes that the public shall supply not only the courthouses and the judges, but also, whenever necessary, the attorney. The precedent being established, Duluth, Dayton, St. Louis, Los Angeles, and Portland, Ore., followed, the work in the last two cities being part of the duties of the public defender. Steps have been taken by officials in Allentown, Pa., and Albany to promote municipal societies, and the Connecticut Legislature at its last session authorized the establishment of legal aid societies.

Types of Organization.

All of the forty-four legal aid societies in the United States are founded on the same principle and are imbued with a common purpose, but they are not all of the same mold. In organization they vary from the Westchester County Legal Aid Society — of which Justice Keogh of the New York Supreme Court writes, "We have no committee, no organization, no officers and no funds" — to the New York Legal Aid Society, which maintains six branches in different parts of the city, expends nearly fifty thousand dollars a year in its work, and which, measured by its clients, is the largest law office in the United States. Five distinct types of organization have appeared. In addition to the private charitable corporation, and the municipal society already mentioned, there are committees of bar associations, law school societies and legal aid departments of the federated or associated charities.

Bar Association and Law School Societies.

The bar association organizations are to all intents identical with the private charitable corporation type except that, as the name implies, they have no separate entity, but are under the official control of the bar association. Societies operated entirely by law school students have been formed in Cambridge (Harvard Law School), Denver (University of Colorado), Oakland (University of California), and Washington (George Washington Law School). This evolution is too recent to permit any fair extended criticism; much good can be accomplished through them, not only for the clients but for the coming generation of lawyers, and it would seem that this type of organization must always operate under certain handicaps and limitations.

Departments of Associated Charities.

The legal aid committee of the federated or associated charities is of significance because it seems to be a happy solution for cities and towns of smaller size, where the question of financing any additional charity has to be considered. There are now sixteen bureaus or committees of this sort, and the device has met with great success, especially in Grand Rapids, Minneapolis, Seattle, and St. Paul. At the present moment this is the most rapidly growing type of legal aid organization.

Criticism of the Five Types.

Any extended discussion of the respective merits of these different types of organization would be unprofitable. But testing them solely on the question as to how far they are a remedy for unequal justice, these general observations may be made. The law school society can never handle serious cases or large numbers of cases; its staff consists of men limited both in experience and in the time at their disposal, and it cannot undertake heavy financial expenditures. The great difficulty with the legal aid committee of the associated charities is that justice and charity are distinct, and ought to be kept distinct. Experience in several cities, notably Baltimore, has demonstrated that the legal aid department of any charity in general is able to reach only persons who are also applicants for charity, whereas a distinct and separate legal aid society reaches the much wider class of those who need legal protection but are not yet dependents on charity. When the pressure of work becomes great, the legal aid committee soon becomes, necessarily, an independent organization. The limitation of the bar association society is the same in so far as it tends to reach only a portion of the community; in all else it is identical with the private incorporated society. These three types are of tre-

mendous auxiliary value, and they are of future importance because out of them strong and independent legal aid societies will develop.

Private or Public Legal Aid.

The great burden of the work must be done and is being done by the privately incorporated and the publicly established legal aid societies. These are the types which are to be found in all large cities. Both will probably co-exist in America for many years. The arguments against the municipal society are those which could also be urged against the municipal gas plants and street railways; undoubtedly politics in a legal aid society would be as bad as judicial corruption, and it may be questioned whether our form of government has reached a stage of efficiency where it can safely be entrusted with a service of this sort. But in the West the story is a most hopeful one. The municipal authorities have undertaken the work seriously; the attorneys are selected on the basis of competitive examinations, and the standard has been set high. In St. Louis, for example, the chief counsel is required by law to be a practitioner of seven years' experience. Likewise the cities have been generous in their support of legal aid work. The Legal Aid Bureau of the Kansas City Board of Public Welfare in one year traced thirteen deserting husbands and brought them back from Missouri, Oklahoma, Colorado, Nebraska, and Washington at an expense of $600. It is officially reported that if a deserting husband can be found, no expense will be spared in bringing him to justice. No State's attorney has any such record, and the private legal aid society, though anxious and willing, is prohibited by financial considerations from undertaking such expensive cases.

All legal aid societies are an answer to the problem of how to secure justice for the poor. But the municipal society is the most hopeful solution; for by recognizing the attorney as an essential and inherent part of our judicial system, and by supplying the attorney in cases of need, it bridges what has hitherto been the impassable gulf, and extends the State's administration of justice to its rightful completion.

National Alliance of Legal Aid Societies.

The influence and the usefulness of all the legal aid societies has been greatly enhanced by the formation in 1911 of the National Alliance of Legal Aid Societies of the United States. Aside from the value of the biennial conferences and the interchange of opinions which such conferences make possible, the Alliance has served to weld all the scattered organizations into a conscious unit, and the spirit of coöperation

engendered thereby is of great practical importance. Cases may now be exchanged from all parts of the country; information desired by Los Angeles may be secured in Boston, and a debt owed a Chicago lodging-house-keeper can be collected in New Orleans. Already the long arm of the law is more than a phrase in legal aid work, and with the steady growth of legal aid societies in the United States and Canada, in the not far distant future every city and town will be within the jurisdiction of the legal aid societies of America.

Legal Aid in Europe.

Europe has learned the value of legal aid work from America, largely through the splendid work of Arthur von Briesen, president of the New York society, who has received in recognition of his services the Cross of the Legion of Honor from the Republic of France, and the Order of the Crown of Prussia from the German emperor. The principles of legal aid work are firmly established in western Europe, although England still lags far behind the Continental States. Germany, with characteristic thoroughness, has organized 300 municipal legal aid bureaus, which in 1913 handled 1,500,000 cases, and has instituted in Berlin a training school for legal aid workers.

A Proposed International Alliance.

In 1913 a convention was held in Nuremberg, which was attended by delegates from Austria, Belgium, Denmark, Holland, Germany, Switzerland, and the United States of America. At that time plans were inaugurated for an international alliance of legal aid societies, but their completion was rendered impossible by the outbreak of war. Nevertheless many cases have been interchanged; the Boston Legal Aid Society is even now working on a case for the Cologne Society, and when peace is restored the future possibilities for international work, especially in cases involving immigrants, are obviously great.

Further Extension of Legal Aid Work.

The legal aid societies have already done a great work. Their accomplishment is truly splendid when one considers the obstacles which have hindered their development, the comparatively slender support which they have received, and the small measure of public recognition which they have secured. Still limited in resources, they are able to realize their aim only in part. But the ideal persists, the conviction that true freedom and equality of justice can be and must be attained deepens with the experience of each passing year, and therein lies the hope of that humble multitude of the poor and oppressed who understand the meaning

of denial of justice in terms of poverty, anguish, and disgrace. Their immediate problems are to secure interest, recognition, and support, and to become so thoroughly known and trusted throughout the community that no legal wrong need go unrighted. The first, and perhaps the most important, step towards this goal is to make clear the part of the legal aid society in our administration of justice.

REGINALD HEBER SMITH.

39 COURT STREET, BOSTON.

Note.

Since this report was written the City of Hartford, Connecticut, on referendum, voted 3,293 to 1,085 to establish a free legal aid bureau under the Board of Charity Commissioners. This will be the first municipal legal aid society in New England.

R. H. S.

CANONS OF LEGAL ETHICS.*

A BRIEF SKETCH OF THEIR HISTORY AND FUNCTION IN AMERICA.

HISTORY.

In the recent little volume entitled "The Ethics of the Legal Profession" by Hon. Orrin N. Carter of the Supreme Court of Illinois, Judge Carter traces the history of codification in America, briefly, as follows:

"Within the last quarter of a century the State bar associations in the majority of the States have adopted codes of ethics. The first one was that of Alabama, adopted December 14, 1887. The American Bar Association adopted canons of ethics in 1908. This contained many of the fundamental principles in the Alabama Code. Several county or city bar associations, especially in the large centers of population, have also adopted codes of a similar character. Most of the State and local codes have been copied very largely from the code of the American Bar Association, or that of Alabama. The rules for admission to the bar in some jurisdictions require candidates to subscribe to a reasonable standard of ethics."

Any one interested in a fuller account of the history of professional traditions will find Judge Carter's book conveniently short, with a bibliography and table of cases.

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* The canons adopted by the Massachusetts Bar Association are printed at the end of the first number of this magazine (November, 1915).

Function.

In his introduction to this book, Dean Wigmore says:

"For lawyers, the most important truth about the law is that it is a profession. That important truth has been more and more forgotten among us, of late years. To restore it to our convictions will be a great service, . . ." "as a profession, the law must be thought of as ignoring commercial standards of success — as possessing special duties to serve the State's justice — and as an applied science requiring scientific training.

And, if it is thus set apart as a profession, it must have traditions and tenets of its own, which are to be mastered and lived up to. This living spirit of the profession, which limits, yet uplifts it as a livelihood, has been customarily known by the vague term legal ethics. There is much more to it than rules of ethics. There is a whole atmosphere of life's behavior. What is signified is all the learning about the traditions of behavior that mark off and emphasize the legal profession as a guild of public officers. And the apprentice must hope and expect to make full acquaintance with this body of traditions, as his manual of equipment, without which he cannot do his part to keep the law on the level of a profession."

As illustrating these traditions the following quotations from Abraham Lincoln, Chief Justice Sharswood, and Chief Justice Ryan are printed as a preface to the Code of Ethics of the American Bar Association:

"There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity, in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is the only safe guide, the only torch to light his way amidst darkness and obstruction." — *George Sharswood.*

"Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is a professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere in human life, the judgment of success is but the verdict of little minds. Pro-

fessional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the bench and of the bar."—*Edward G. Ryan.*

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. . . . Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife and put money in his pocket? A moral tone ought to be infused into the profession which would drive such men out of it."—*Abraham Lincoln.**

The preamble of the Code of the American Bar Association opens with the sentence:

"In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration."

Special lectures on "Legal Ethics" are constantly appearing in the law schools of the country.

The Practical Application of the Canons.

"An honest lawyer is only one kind of an honorable man."

"The instinct of honor is always to be ready to face the facts, and to do and consent only to such acts as are worth that price."

Some men object to, and even ridicule, the idea of reducing standards of professional conduct to the form of codified rules, and as Judge Carter points out, "it is always found difficult to state abstract ethical propositions in practical form" to satisfy lawyers. The convenient word "code" unfortunately tends to create some prejudice against the real value of the group of canons which have been framed to assist members of the profession in dealing with serious and sometimes difficult problems, in connection with which the history of the best practice and the reasons for it are not always conveniently available. There is nothing new in the ideas expressed in the canons.

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* This quotation from Abraham Lincoln is taken from "Notes for a law lecture," written apparently about July 1st, 1850, and printed in Nicolay and Hay's "Works of Abraham Lincoln," Vol. II., p. 142.

As a practical matter the force of these canons is the force of illustration, in a general way, of high standards of fair dealing and good taste. How far men will live up to such standards is for them to decide.

Take, for example, the 13th Massachusetts canon relating to contingent fees. This, and perhaps some of the other canons, may be further illuminated by the following passage written in freer and less stilted language than is possible in a formal rule, and quoted from the *American Law Review* for March, 1882, pp. 252, 253:

"There is no absolute doctrinal line to be drawn in the matter. The distinctions to be made are practical and dependent upon the circumstances of each case and the characters of the advocates and the clients. Since nature selects lawyers as a class to hold up their side of the burden of society, they by such service pay the price for such selection. A part of the price is the regard with which they have to observe and practice what will prove to others that confidence in them is well founded. One of the elements of such proof is the absence of being too willing to be another man's man for his money, his favor, or our own comfort, ambition, and victory. The contingent fee which one cannot always be sure of, but which is always worth working for, is one's own self-respect. If this is earned the other contingent fees will probably be right, and very likely fewer will be offered. If you whip a stream, some fish rise to the bait without being hungry, and fish are said to have colder blood than men. The question of contingent fees is — when to stop fishing for clients; and, after you have the clients, when to stop fishing for facts.

This view of our profession, its motives and its rewards, appears to be essentially consistent with sentiments which have been cherished by a long line of able and noble counsellors, advocates, and judges, living and dead, as the foundation of some of the best as well as the happiest experiences which human nature has ever yielded to true devotion to private good, and an honest regard for the public weal."

If the canons are read and considered in the light of some of these quoted passages (and especially if the professional history of the ideas expressed is examined), it is submitted that they will be found serviceable to the profession as a whole, to its individual members, and, above all, to the public for the service of which the bar exists.

F. W. G.

MISCELLANEOUS.

The Land Registration System.

In a recent note in a leading law magazine * an unfortunate incident in the administration of the "Torrens Act" in the Philippine Islands is made the occasion for an interesting discussion of the development of registration acts, with a footnote containing convenient and valuable references. The Philippine case referred to is thus stated: "The plaintiff registered his land under the Torrens' system. Later an adjoining owner registered his land, the plaintiff having actual notice of the proceedings. The adjoining owner obtained a certificate which included a wall also included in the plaintiff's certificate. The adjoining owner sold to the defendant, a purchaser for value. The plaintiff now seeks to reopen the later decree, and have the defendant's certificate reformed, claiming that the wall belongs to him. *Held:* that the decree will be reopened. *Legarda* v. *Saleeby*, 13 Phil. Off. Gaz. 2117 (Phil. Sup. Ct.)." Two judges out of six appear to have dissented.

In the editorial comment upon the decision it is referred to as one "which, if accepted as law, may go far to undermine public confidence in the system" and in a footnote it is stated that "the United States Supreme Court has not yet passed on the constitutionality of the system."

Since the case of the *American Land Co.* v. *Zeiss*, 219 U.S. 47, however, so far as the Massachusetts act is concerned and the great and growing jurisdiction under it, which has been developing for eighteen years to the general satisfaction and great convenience of the community, there does not appear to be any serious question remaining open as to the valid constitutional basis of the work of our Land Court. It has become an established part of the government of the State, underlying a vast amount of development of the interests of the citizens. In the recent case of *U. S.* v. *Midwest Oil Co.*, 236 U.S. 459, at 472, the Court, speaking through the late Mr. Justice Lamar, said:

"Government is a practical affair intended for practical men. Both officers, law makers, and citizens naturally adjust themselves to any long continued action . . . on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle, but the basis of a wise and quieting rule that in determining the meaning of a statute or the

* Harv. Law Rev. for May, 1916, p. 772.

existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation."

The history of the law affords few samples of a practical experiment in government which has established itself so soon and so satisfactorily as a useful and permanent institution with the general acquiescence of the community, and a growing use of the opportunities provided, as the Land Court of Massachusetts. Whatever may be the problems elsewhere, it is submitted that there is no occasion for uncertainty in the minds of the Massachusetts bar as to the essential soundness of the system when properly administered.

As to the difficulty of administration resulting from the issuance of two registration certificates concurrently covering the same wall between two adjoining owners in the Philippine Islands, such a thing would be a practical impossibility under the system as administered in Massachusetts. The question of administration is not merely a question of law but is a mixed question of law and civil engineering. Adequate arrangements for the requirement of accurate plans and for the gradual survey of the entire area of the State which must be contemplated (whether expected or not) under such a system are as important as arrangements for a competent Court. The successful operation of the system depends upon the coöperation of the Court and its engineering assistants. An actual examination of the way in which the work of the Land Court is carried on in Massachusetts is recommended to those who are not familiar with its work.

Whatever the ultimate result in the Philippine case, "public confidence in the system" would not be undermined in this State.

F. W. G.

Bellows Falls Power Company v. Commonwealth, 222 Mass. 51.

We are informed that the plaintiff has carried this case to Washington, where it is now pending before the Supreme Court of the United States.

The secretary has received the following comment upon the abstract of the case which was printed in the Quarterly Digest in the February number of this magazine.

"In your note of this case you repeat the remark in the opinion that a point decided is that Vermont cannot give shares in a corporation a legal habitation and taxable situs in Vermont so as to

prevent their taxation in Massachusetts. But does the case go quite as far as the opinion suggests and you assert? May not the case be within the opinions in *Hamilton Manufacturing Co.* v. *Massachusetts*, 6 Wall. 632; *Plumer* v. *Coler*, 178 U.S. 115, at 126–129; *Provident Institution for Savings* v. *Massachusetts*, 6 Wall. 611?

If this is so, is the question which was left open in *Hawley* v. *Malden* involved? Must it not wait until an individual is taxed on shares of such a Vermont corporation? Even then would the decision extend beyond cases where shares are personal property? Would it reach a case where a State statute provides that shares of a manufacturing corporation are for all purposes real estate at the place where the factory or the corporation is located?

The Federal Constitution gives a certain amount of protection against double taxation. So far as it goes the current decision asserts the power to tax twice. Is not the ultimate question whether having property represented in the form of securities is inconsistent with having it receive the constitutional protection to which the substance of matters entitles its owner?"

The Publication Committee will be glad to receive at any time either comments or corrections as to statements in the Quarterly Digest of cases.

Judge Miller and Chief Justice Taney.

(From Gregory's Life of Samuel Freeman Miller, pages 53–55.)

Referring to the time of Judge Miller's appointment to the Supreme Court of the United States Mr. Gregory says:

"It was feared that on his appointment he might collide with the venerable Chief Justice Taney; but on the other hand, a rare and tender regard sprang up between these men so opposite in their views. At the end of their first year of service together, as the Judges separated to attend their circuits, the aged Chief took his young associate by the hand and said: "My brother Miller, I am an old and broken man. I may not be here when you return. I cannot let you go without expressing to you my great gratification that you have come among us. At the beginning of the term, I feared that the unhappy condition of the country would cause collisions among us. On the other hand, this has proved one of the pleasantest terms I have ever attended. I owe it greatly to your courtesy. Your learning, zeal, and powers of mind assure me that you will maintain and advance the high

traditions of the Court. I predict for you a career of great usefulness and honor."

Mr. Henry E. Davis has preserved a statement of Judge Miller as to the Chief Justice, which is a most interesting supplement to this. "He once said to me," says Mr. Davis, "'When I came to Washington, I had never looked upon the face of Judge Taney, but I knew of him. I remembered that he had attempted to throttle the bank of the United States, and I hated him for it. I remembered that he took his seat upon the bench, as I believed, in reward for what he had done in that connection, and I hated him for that. He had been the chief spokesman of the Court in the Dred Scott case, and I hated him for that. But from my first acquaintance with him, I realized that these feelings toward him were but the suggestions of the worst elements of our nature; for before the first term of my service in the Court had passed, I more than liked him; I loved him. And after all that has been said of that great, good man, I stand always ready to say that conscience was his guide, and sense of duty his principle.'"

Chief Justice Chase declared that "beyond question, the dominant personality now upon the bench, whose mental force and individuality are felt by the Court more than any other is Justice Miller, who is, by nature, by intellectual constitution, a great jurist."

This glimpse of Judge Miller adds interest to his estimate of a Massachusetts lawyer and judge whose services to the profession and to the whole country are comparatively little known to the present generation at the bar. Owing to its dramatic character, the main incident with which the name of Benjamin R. Curtis is connected in the minds of the public is his dissenting opinion in the Dred Scott case. Great as this service was, it was but one incident in the exceptional career of the man who helped to make life more convenient for the entire Massachusetts bar of to-day by his work as chairman of the commission which drew the Massachusetts Practice Act of 1851. It was that commission which retained for Massachusetts the simple outlines of common law pleading at a time when other States were laying foundations for endless confusion and inconvenience by attempting to codify everything in sight.

The following brief sketch of Judge Curtis is taken from an editorial review in the *American Law Review* for May, 1880, of the two volumes containing an account of his life and miscellaneous writings which appeared in 1879.

SKETCH OF BENJAMIN R. CURTIS.

"Mr. Justice Miller of the United States Supreme Court, in a recent address delivered before the Iowa Bar Association, in speaking of the late Justice Curtis, described his place at the bar of this country in these words: 'In this sense I pronounce Benjamin R. Curtis the *first* lawyer of America, of the past or present time. I do not speak of him as an advocate alone or specially, nor as a counsellor; I speak of him as a lawyer in full practice in all the courts of the country, as engaged in a practice which embraced a greater variety of questions of law and of fact than is often to be found in one man's experience.' We quote these remarks of Mr. Justice Miller in preference to making a selection from the many eulogies which were pronounced at the time of Mr. Curtis's death, because they are the deliberate expression of opinion of an able lawyer, an accomplished jurist, and the member of a bar of a distant State, and uninfluenced therefore by the local pride felt in the success of a fellow-townsman. That this opinion of Justice Curtis is generally held by the profession in New England it is not necessary for us to assert.

"It was a remarkable proof both of his ability as a lawyer and of the public appreciation of his character that Mr. Curtis should have been selected at the early age of forty-two years, without solicitation on his part or political influence, and from such a bar as then existed in New England, to fill the vacancy in the United States Supreme bench caused by the death of Mr. Justice Woodbury. And at that time, although Mr. Curtis had argued during the seventeen years in which he had practised in Boston more than one hundred and thirty causes before the Supreme Judicial Court of Massachusetts, he apparently had not appeared in a single cause before the United States Supreme Court. His reputation, like his practice, must, therefore, have been largely confined to New England. We find, however, not only that the Secretary of State and the President of the United States had both thought of Mr. Curtis on the same day, and had each written to the other suggesting him as the best person to fill the vacancy, but Mr. Webster adds, in his letter to President Fillmore, that the 'universal sentiment in Boston is, that the place should be filled by the appointment of Mr. Curtis.' The biography before us explains the cause of this remarkable unanimity of sentiment. Mr. Curtis had not only a natural taste for and an inborn love of the science of law, but constant reading had made him a 'full' man; . . .

"His power of continuous labor was unusual. He himself informed the writer that in the preparation of the answer of President Johnson to the articles of impeachment (a production

which some of the best legal writers consider the ablest piece of legal authorship of this century), in which he was unassisted by the other counsel, who had not yet arrived in Washington, he had worked upon it for more than thirty consecutive hours without rest or sleep, and this was in his sixtieth year.

"His relations with his associates upon the Supreme Bench, and the duties to be performed by him as associate justice, were pleasant to an unusual degree, and he was treated by the other judges with marked respect, considering that he was so much their junior as to be familiarly called by some of them their 'little Benjamin.' When we consider that, of the seven justices who sat with him at that time, the oldest was thirty-two years older than himself, and four of the others twenty-three years older, we can understand what an unpleasant duty it was, and how much strength of character it required, to take the position which he did in his great dissenting opinion in declaring the opinion of the majority to be extrajudicial. In the correspondence with Chief Justice Taney, which we are glad to see published in full for the first time, we see the same self-respect, the same power of expressing his meaning with perfect distinctness, and the same calm firmness which characterized the man through life. The letters of Mr. Curtis seem to us to be especially creditable to him, considering his position as the youngest member of the Court, and the readiness shown by some of the other members to support the Chief Justice in his arbitrary action. On the other hand, the letters of the Chief Justice are those of a man who has been detected in doing something which he knows he has no right to do and of which he is ashamed.

"It is one of the curiosities of history that Judge Curtis, who was so venomously abused by the abolitionists and by such men as Theodore Parker for many years before the war, and whose position during the war was misunderstood, and for many years thereafter misrepresented, by the Republicans, should, on the two great occasions of his own life, have performed services of such inestimable value to the Republican party — services, we may add, which never received any recognition from the majority of that party. By his unanswerable exposition of the principles of free citizenship in his dissenting opinion in the *Dred Scott Case*, wherein he showed clearly to the world that the Democratic party were endeavoring to foist upon the country a political decision in their favor, and one not properly before the Court, he gave the first impulse to the great Republican party by providing a legal foundation upon which the honest and law-abiding masses of the North, who had shrunk from joining a party made up con-

fessedly of people who were pledged to break the law, could stand and legally oppose the Southern invasions of the rights of citizenship.

"This service was fully appreciated at the time, but was soon forgotten; and because the judge showed the same judicial calmness during the excitement of a civil war, and opposed what he considered a dangerous tampering with the constitutional power of the President, he was denounced and abused by the partisan press of the North.

"Ten years after his dissenting opinion was delivered, he rescued the Republican party from the demoralization and disintegration which, it is admitted, would have overtaken it had the impeachment of President Johnson been brought to a successful termination. The few Republican senators who bravely resisted the party demands have frankly confessed that it was mainly due to Judge Curtis's conclusive argument that they became convinced of the illegality of the impeachment.

"The position occupied by Judge Curtis after his resignation from the bench of the Supreme Court was exceptional. The first judge to practise after his resignation from such a position, it required an unusual dignity and force of character to sustain the position with credit and honor to himself. His practice soon ceased to be local, and his opinions were sought by clients from all parts of the country. He argued many of the most important causes which came before the United States Supreme Court, and was listened to by the Court with marked respect and attention. It has been noticed that in every case which he argued, and which was decided in his favor, the decision was based upon the grounds stated in his brief. For many years before his death, the writing of opinions occupied much of his time, and so much were they valued, that he became in many cases a tribunal whose decision was final."

An Echo from 1820 in Support of the Recommendations of the Special Commission of 1914 on Legislative Procedure.

(Remarks of Hon. William Sullivan of Boston in the Massachusetts Convention of 1820 at page 488.)

The question was on abolishing the office of solicitor general. In the course of his remarks Mr. Sullivan said: "He had noticed that laws were frequently passed by the Legislature, in a form which reflected disgrace upon the Commonwealth. There ought to be some accurate lawyer appointed, with a salary, to revise them before they are promulgated." He then said that he thought the attorney general and solicitor general between them might look out for this.

THE NEW COMMON LAW RULES OF THE SUPERIOR COURT FOR CIVIL BUSINESS.

Court rules, like the principles of the common law, are the result of experience. They do not spring into existence as completed systems, carefully planned to deal with every detail of judicial business — they are made, one at a time, as the necessity for regulating particular matters arises. This is inevitable. A workable collection of rules could hardly be created in any other way. But when, by this method, a Court has accumulated sixty-nine miscellaneous regulations there is material enough to be sorted out, polished, and arranged in an orderly code. This the Superior Court has done in the new revision of the rules for the conduct of civil business at common law, which went into effect January 3, 1916.

In the 1906 revision, the Rules retained the defects incident to their origin. They were arranged in a somewhat irregular order, without any titles, and contained occasional repetitions and clumsy phraseology. Sometimes they were introduced by recitals, as in the case of Rule Six, which began, "When it is objected that a bill of particulars is insufficient, and the Court shall so adjudge." All this is now eliminated. The new rules are tersely stated, are supplied with titles for ready reference, and are arranged in an orderly sequence so as to follow an action from its entry on the docket to final judgment. Of course many matters are still unregulated. There will continue to be amendments and additions as there have been in the past. But we have a complete skeleton into which amendments and additions can be fitted, and a standard of style to which they will tend to conform. Amendment and improvement will be directed to perfecting a system the general outline of which can now be seen.

In making this revision the Court has seized the opportunity to introduce several new rules and make several substantial alterations in old ones. It is the purpose of this paper to note all these substantial alterations, with comments which may perhaps be found convenient by the bar.

THE REVISION COVERS ONLY COMMON LAW BUSINESS.

The new pamphlet includes only the common law rules. For the equity rules, the divorce rules, and a number of important standing orders applicable to common law cases it is still necessary to refer to the rule book of 1906.

THREE RULES HAVE BEEN DROPPED.

Of the Rules of 1906, Number 46, relating to petitions for the partition of land; Number 47 relating to pleading in real actions; and Number 59, relating to the appointment of standing bail commissioners, have been dropped from the new revision. Real actions are no longer within the jurisdiction of the Superior Court, and the appointment of standing bail commissioners is hardly within the purview of a code of rules for the conduct of civil causes. The reason for dropping Rule 46 relating to partition proceedings is not so obvious; but presumably it was dropped because petitions for partition of the law side of the Court have become exceedingly rare.

ENTERING APPEALED AND REMOVED CASES.

In entering cases brought up from the lower courts, it is now necessary to file not only copies of the papers below, as required by the old rules, but also a certified copy of the entire record, which includes the docket (Rule 1 of 1915; Rule 1 of 1906). The form of the certificates furnished to the appellant by the clerk of the lower court has been modified accordingly. The lack of a complete copy of the record below has often caused serious trouble in dealing with appealed cases.

APPEARANCE FOR TRUSTEE IN TRUSTEE PROCESS.

Rule 3 of 1906 provided that no attorney for the plaintiff "in a trustee process" should appear for the party summoned therein as trustee. In Rule 4 of 1915 this prohibition is directed to the attorney for the plaintiff "in an action begun by trustee process." Clearly the Court had no intention of changing the meaning of the rule so as to permit the plaintiff's attorney to appear for a party summoned as trustee by special precept; and doubtless the Court would be fully authorized on general principles of law, quite apart from any rule, in refusing to recognize the appearance of an attorney for two adverse parties in the same action. The effect of this rule has not been changed.

OBJECTIONS TO THE APPEARANCE OF COUNSEL.

Under the old rules, the authority of an attorney to appear for and represent any party to the action could not be questioned by an opposite party except by an objection in writing taken within ten days after his appearance was entered. This rule has now been abolished, and the objection may now be taken in any form

and at any time (Rule 3 of 1915; Rule 3 of 1906). Probably the old rule was unduly rigid, and cases can readily be imagined where it ought not to be applied, but it does not follow, because the rule has been abolished, that the Court will look favorably on objections taken at inopportune times and in a manner to embarrass opposing counsel. See *Norwood* v. *Dodge*, 215 Mass. 351, for a case in which the full bench thought the wisdom of the old rule "well illustrated."

RULES REGULATING THE FILING OF PLEADINGS AND JURY CLAIMS.

The changes in the rules governing the filing of pleadings are the most extensive in the entire revision (Rules 7–10 of 1915; Rules 9–14, 67 of 1906). The time for filing pleas in abatement and motions to dismiss is extended from ten to twenty days after the return day of the writ, or the date of entry if the case is appealed or removed from a lower court. This automatically produces an equal extension in the time for removing actions to the Federal Courts (1913 U.S. Compiled Statutes, Sec. 1011; Federal Judicial Code, Sec. 29; *Martin* v. *Baltimore & Ohio Railroad Company*, 151 U.S. 673, 686, 687). The time for filing demurrers and answers, including answers in mechanics' lien cases, is reduced from thirty to twenty days, and this effects a corresponding reduction in the time for filing declarations in set-off (R.L., c. 174, sec. 9). As a result, all the defendant's pleadings must be in twenty days after the case is entered. This means twenty-one days in practice, inasmuch as the twentieth day after the Monday entries falls on Sunday, and the Court uniformly allows pleadings due on Sunday to be filed on the succeeding day. Subsequent pleadings must be filed "within ten days after the necessity for such pleading arises," which in the case of an answer to a declaration in set-off is, of course, ten days after the declaration in set-off is filed and not ten days after the time for filing has expired. It is not clear whether a bill of particulars or specification of defense is a pleading within the meaning of the ten-day rule noted above, but it would seem to be proper and convenient to treat it as such in cases where the time for filing is not specified in the order of the Court.

Claims for a jury must still be filed ten days after the expiration of the time allowed for the answer—that is, under the new rules, within thirty days from the entry day. The "concise statement of issue which he desires to submit to the jury," which the defendant claiming a jury trial must file in mechanics' lien cases, may now be filed with the jury claim instead of with the answer, as was for-

merly required, so that the time for preparing and filing these issues has not been reduced (Rule 8 of 1915; Rule 67 of 1906).

Full copies of all pleadings subsequent to the declaration must be sent to opposing counsel on the day on which such pleadings are filed, instead of the mere notices formerly required (Rule 10 of 1915; Rule 14 of 1906). No method of enforcing this rule is provided, and it seems probable that it will be disregarded, like the old rule which it supplants. To enforce this rule, it would probably be necessary to require that a certificate of notice be annexed to all pleadings.

Any pleading, whatever its nature, filed by the defendant, will now be treated as a general appearance for all purposes, unless otherwise distinctly specified (Rule 7 of 1915).

The foregoing changes not only make the filing of the pleadings more convenient and expeditious, but they make it possible to place Suffolk cases on the trial lists for the second month after the entry day.

AMENDMENTS.

Formerly amendments could be allowed only upon terms unless terms were waived by the objecting party (Rule 5 of 1906). Now the imposition of terms rests in the discretion of the Court (Rule 5 of 1915). This change is clearly authorized by the statute (R.L., c. 173, sec. 48; c. 203, sec. 19), and it brings the Superior Court rules into accord with those of the lower courts (Rule 16, Boston Municipal Court; Rule 14, District, Police and Municipal Courts), and with the prevailing practice of the bar in not insisting upon terms. It is merely a formal recognition of a practice that has long existed in fact.

Another excellent change is that which permits amendments made by agreement of the parties to take effect upon filing without the action of the Court (Rule 6 of 1915). Of course this rule does not alter the rights of sureties on attachment bonds, or persons who have purchased or attached property under attachment in the amended suit. Such persons are bound only by the cause of action stated on the record at the time when they become sureties or purchased the attached property, and if the amendment effects a substantial change in the cause of action, as stated on the record, they, or the attached property which they have purchased, will be discharged. The rights of such parties can be concluded at the time the amendment is made only by making them parties to the agreement, or citing them in to object.

It is not entirely clear whether the new rule enables the parties

to amend the record by agreement so as to substitute a new cause of action entirely different from that originally intended. The Court has no power to allow such an amendment against objection (*Church* v. *Boylston & Woodbury Café Company*, 218 Mass. 231), for the statute authorizes the Court to allow only such amendments as "may enable the plaintiff to sustain the action for the cause for which it was intended to be brought" (R.L., c. 173, sect. 48). And the Practice Act reads: "Parties may make agreements relative to amendments . . . which shall be equivalent to an order of Court to the same effect" (R.L., c. 173, sect. 70). It may be argued, therefore, that so far as the statute goes, parties may not substitute a new cause of action by an agreement to amend. On the other hand, if a new cause of action is introduced by such an agreement, the proceeding has every substantial characteristic of an action entered without service on the defendant, in which the defendant voluntarily appears: and as judgment entered in an action so commenced would be final and binding on all the parties, there does not seem to be any good reason why a judgment entered on a declaration amended in the manner supposed would not be equally valid. There would be no way to attack such a judgment save by contending that the Court could not acquire jurisdiction of any cause of action except by the entry of a writ intended to be brought for that cause and the payment of an entry fee. Since such a contention would be very artificial and would lead to an unnecessary and unjust result, it seems unlikely that it would be sustained. However, in any case where it is possible to argue that a proposed amendment would introduce a new cause of action into a suit, parties would undoubtedly render their rights more secure by having the amendment formerly allowed by the Court. Such an allowance is conclusive of the identity of the cause of action with that originally sued on (R.L., c. 173, sect. 121; *Commonwealth* v. *National Contracting Company*, 201 Mass. 248).

DEFECTIVE BILLS OF PARTICULARS AND SPECIFICATIONS.

The procedure upon the filing of a defective bill of particulars or specification of defence has been simplified and made similar to that which follows a failure to answer interrogatories. Formerly a plaintiff who filed a defective bill of particulars might be nonsuited on motion unless he filed a counter-motion to amend. For a defective specification of defence the only remedy was an order that the defendant be forbidden to offer evidence in support of the defences which he had failed to properly specify. Under the new

rules, if a bill of particulars or specification is defective, the opposite party may obtain an order for the filing of a new bill or specification within a designated time, which order not being complied with, the party in default may be non-suited or defaulted on motion as the case may be (Rule 6 of 1915; Rule 6 of 1906).

INTEREST ON MONEY PAID INTO COURT.

Any interest earned by money paid into court while deposited to the credit of the clerk must now be paid over to the party entitled to the principal sum (Rule 16 of 1915; Rule 26 of 1906).

DEPOSITIONS.

Under the old rules, commissions to take depositions outside the State might be directed generally to any Massachusetts commissioner, or to any person authorized to administer oaths in the place where the deposition was taken (Rule 33 of 1906). This may still be done, but the new rules also authorize the issue of commissions directed to "such other persons as the Court may order." These words appear to include any impartial person designated by name, whether an officer or not (Rule 19 of 1915). The power to issue such commissions is conferred on the court by statute (R.L., c. 175, sec. 42.) But commissions directed to persons other than commissioners of oaths for Massachusetts, appointed by the governor, will not issue except upon special order of Court or by agreement (Rule 19 of 1915; Rule 33 of 1906).

Formerly neither party could use a deposition taken by his opponent except upon paying the expenses of taking the same. Now this may be done upon such terms as the Court sees fit to impose (Rule 22 of 1915; Rule 36 of 1906).

NOTICE TO ADMIT UNCONTESTED FACTS.

An attempt is made in the new rules to relieve parties of the burden of proving matters not really in dispute by allowing them to send to the other party and file with the clerk a notice, calling upon the other party to admit the truth of facts and documents "deemed not to be in dispute" subject to all legal objections to their use as evidence at the trial (Rule 38 of 1915). The party to whom the notice is given may file an answer with the clerk admitting or denying the facts in question, and if he files no answer he is deemed to admit them for the purposes of that trial. What happens to a party who denies facts he is called on to admit without any reasonable ground for such denial the rule does not say. Rule 61 of 1915 — reënacting Rule 8 of 1906 — provides

that a party who sets forth in his declaration or answer matters on which he does not intend to rely shall pay to the opposite party the cost of witnesses occasioned thereby. But it is hard to see how that rule can be construed to cover this case, for it relates expressly to another matter, and the fact that a party does not, controvert a particular point at the trial does not prove that he did not intend to controvert it when he drew his pleadings. Unless the Court consistently imposes costs where an admission of facts is unreasonably refused, it seems probable that refusals to admit will become as much a matter of course as answers of general denial. The English model from which it is taken expressly authorizes the trial judge to impose the cost of proving any fact on the party who, after notice, has unreasonably refused to admit it, no matter who may prevail upon the whole evidence presented at the trial (Rules of the Supreme Court; Order 32, §§ 2, 4; to be found in 1916 Annual Practice, pp. 546, 548).

NOTICES TO OPPOSING COUNSEL.

All notices given by mail to the adverse party, or his attorney, pursuant to the rules, must now be addressed to him *at his business* address (Rule 28 of 1915; Rule 27 of 1906). This will not, of course, work any change in the practice, but it makes it necessary to insert a statement that notice was sent to counsel's business address in the affidavit of notice.

TRIAL LISTS.

All matters relating to trial lists have been collected and arranged in Rules 32–35 of 1915. The rules for Suffolk continue to be different from those in other counties. The only new matter of importance is the following: "Except by order of the Court, no case shall be put on any daily or weekly short list where interrogatories remain to be answered or motions to be heard. Placing a case upon a daily or weekly short list for trial, or permitting it to be so placed, without objection, shall be a waiver of any motion then undisposed of, and of the right to insist upon answers to interrogatories then unanswered" (Rule 32 of 1915).

POSTPONEMENTS ON ACCOUNT OF ABSENCE OF WITNESSES.

In preparing an affidavit of the absence of material witnesses, in support of a motion for postponement, it is now necessary to state not only the name, but the residence of each absent witness, whenever his residence is known (Rule 25 of 1915; Rule 30 of 1906).

CONDUCT OF TRIALS.

There are a variety of new rules with regard to the conduct of trials. The manner of challenging jurors is regulated in detail (Rule 39 of 1915).

"The Court in its discretion may permit a defendant to make an opening statement to the Court or jury before any evidence is put in" (Rule 40 of 1915). Defendants have frequently availed themselves of this rule, and it is said to work well.

"No attorney shall be permitted to take part in the conduct of a cause in which he is a witness for his client except by special leave of the Court" (Rule 41 of 1915); thus enacting into rule a long-standing principle of good practice.

Rule 51 of 1906 has been amended to read: "Unless otherwise permitted by the Court, the examination and cross-examination of each witness shall be conducted by one counsel only for each *party*, and the counsel shall stand while so examining or cross-examining" (Rule 42 of 1915). "Party" was formerly "side." Apparently, under the old rule, the Court might have refused to permit more than one or two attorneys, representing two joint defendants, to examine any witness. It is now clear that witnesses may be examined separately on behalf of each party, even though in the same interest. But the change does not, of course, abridge the general power of the Court to keep examination within the reasonable bounds. The whole rule is to be treated rather as a statement of principle than a rigid rule of thumb (*Johnson* v. *Shaw*, 204 Mass. 165).

REQUESTS TO DIRECT VERDICT.

"The question whether the Court should order a verdict must be raised by a motion. Such question shall not be raised by a request for instructions to the jury" (Rule 45 of 1915).

EXCEPTIONS TO RULINGS.

"Exceptions to an order, ruling or decision made in the absence of counsel shall be saved by filing in the clerk's office within three days after the receipt of notice from the clerk of such order, ruling, or decision a written statement that the party excepts thereto" (Rule 46 of 1915). The old rules made no provision for excepting to rulings made in the absence of counsel. As the right to save exceptions is statutory, the right to except to rulings made in the absence of counsel must always have existed (R.L., c. 173, sec. 106). But the exceptions had to be saved within a "reasonable time" after notice (*Richards* v. *Applay*, 187 Mass. 521, 524). The effect of the new rule is, therefore, simply to define the reasonable time for taking exceptions.

BILLS OF EXCEPTIONS AND REPORTS.

"When a case is reserved for report, the counsel for the plaintiff shall present a draft report within twenty days thereafter, or within such further time as the Court may by special order allow" (Rule 55 of 1915). If the rule is not complied with the case will proceed as if no reservation had been made.

This rule was adopted to put an end to what had become a source of serious delay in many cases. It applies the same rule to reports that has long prevailed in the case of bills of exceptions.

Before dismissing a bill of exceptions for failure to present it for allowance, the clerk must now notify the judge who tried the case, as well as the parties, of the impending dismissal (Rule 54 of 1915; Rule 64 of 1906). This will enable the judge to allow further time in which to present the bill, if he thinks proper, without putting parties to the inconvenience of seeking further time. Presumably, also, it will enable the judge to call for the bill of exceptions himself and, in many cases, arrange for its allowance by correspondence with the parties, without a formal presentment and hearing.

Judgment cannot now be entered in any action in which exceptions have been noted until the time for filing exceptions has expired (Rule 57 of 1915). This puts an end to the necessity of continuing cases for judgment in order to enable exceptions to be filed where the time for filing exceptions runs or is extended beyond the time when judgment would otherwise be entered.

ENTRY OF JUDGMENT.

The standing order passed April 7, 1913, directing judgments to be entered every Monday in Suffolk County has now been incorporated in the Rules. In other counties judgments are still entered monthly. The standing order of April 7, 1913, also provided that judgments in Suffolk should be entered at ten o'clock in the morning. This provision fixing the hour has been extended to all the counties, thus removing the former uncertainty as to the precise time when the judgment took effect (Rule 57 of 1915; Rule 23 of 1906; S.O., April 7, 1913).

FORMS AND TABLE OF CASES.

There is an Appendix to the pamphlet containing forms for use under the new Rule 38 relative to notice to admit facts and documents; and also a convenient reference table to earlier editions of the rules and cases bearing upon them, prepared by Edmund S. Phinney, Esq., Assistant Clerk of the Superior Court in Suffolk County.

Such are the principal changes which the new rules have made in the practice before the Superior Court. All are improvements and some are considerable ones. With the accompanying improvement in arrangement and form, any existing defects will doubtless be more quickly perceived and more readily remedied than in the past. The Rules of the Superior Court seem to be approaching a state of completeness where the expediency of leaving many matters of practice, now covered by the statutes, to be regulated by the rules as enlarged and perfected will be manifest.

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REVIEW OF LEGISLATION OF 1916.

The legislature is still in session, but most of the matters of general interest to the profession which were introduced have been already disposed of, one way or the other, and the session will probably come to an end soon.

The most important act is Chapter 98 of the General Acts relating to a constitutional convention, which has been printed in full at the beginning of this number.

Next in importance to the profession is the Resolve providing for the appointment of a commission of three to prepare the fifth revision of the statutes of the Commonwealth. This Resolve is as follows:

C. 43.—RESOLVE PROVIDING FOR A CONSOLIDATION AND ARRANGEMENT OF THE GENERAL LAWS OF THE COMMONWEALTH.

Resolved, That the governor, with the advice and consent of the council, shall appoint three able and discreet persons, learned in the law, to be commissioners for consolidating and arranging the general laws of the commonwealth, including such provisions of the Revised Laws, approved on the twenty-first day of November, nineteen hundred and one, and of all general laws since enacted or which shall have been enacted when the commissioners make their report hereinafter provided for, as may be in force and operation at the time of said report. The commissioners shall carefully collect under different titles and chapters, upon the plan and general form and method of the Revised Laws, all acts and parts of acts relating to the same subject; and shall execute the said consolidation and arrangement in such manner as in their judgment will render the laws thus consolidated most concise and intelligible. The commissioners may, in consolidating and arranging the laws, omit redundant enactments, and those which may have ceased to have any effect or influence on existing rights; may reject superfluous words, and condense into as concise and comprehensive a form as is consistent, with a full and clear expression of the will of the legislature, all circuitous, tautological, and ambiguous phraseology; suggest any mistakes, omissions, inconsistencies, and imperfections which may appear in the laws to be consolidated and arranged, and the manner in which they may be corrected, supplied, and amended. The commissioners shall indicate by brief marginal notes and references, the laws, chapters, and sections consolidated and arranged by them, the substance of the contents of each section, and the leading judicial decisions upon the same. They shall complete the said consolidation and arrangement, and present in print a report of substantive changes to the legislature on the first Monday of January, nineteen hundred and eighteen, and their final report on the first Monday of January, nineteen hundred and nineteen. Said commissioners shall each receive as compensation five thousand dollars a year, and may expend such sums for clerical assistance and otherwise as the governor and council shall determine. [*Approved April 6, 1916.*]

The Commissioners appointed under this resolve are Henry W. Dunn, Esq., of Boston, Hon. James M. Swift of Fall River, M. Sumner Coggan of Malden.

C. 184. — An Act relative to suits against voluntary associations created by written instruments or declarations of trust.

Section 1. A voluntary association, created by written instrument or declaration of trust, the beneficial interest in which is divided into transferable certificates of participation or shares, may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees under such written instrument or declaration of trust, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in the performance of their respective duties under such written instrument or declaration of trust, and for any damages to persons or property resulting from the negligence of such trustees, agents, or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient.

Section 2. This act shall take effect upon its passage. [*Approved May 9, 1916.*]

C. 174. — Making district police and municipal courts, courts of "superior and general jurisdiction" within their field and extending their process throughout the state.

Section 1. The process, civil or criminal, of a district, police or municipal court shall run throughout the commonwealth for service in any case or proceeding within its jurisdiction.

Section 2. District, police, and municipal courts shall be courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction, and it shall not be necessary for any order, decree, judgment, sentence, warrant, writ or process which may be made, issued or pronounced by them to set out any adjudication or circumstances with greater particularity than would be required in other courts of superior and general jurisdiction, and the like presumption shall be made in favor of proceedings of such courts as would be made in favor of proceedings of other courts of superior and general jurisdiction. [*Approved May 3, 1916.*]

C. 163. — Relative to enforcing certain mechanics' liens.

Section 1. Any person who, prior to January first, nineteen hundred and sixteen, had acquired a lien or the right to enforce a lien in accordance with the provisions of chapter one hundred and ninety-seven of the Revised Laws, and acts in amendment thereof, may enforce the same in the same manner as though chapter two hundred and ninety-two of the General Acts of the year nineteen hundred and fifteen had not been enacted; and the provisions of said chapter one hundred and ninety-seven and acts in amendment thereof that may be applicable thereto are hereby reënacted so far as is necessary for the aforesaid purpose.

Section 2. If an action or other proceeding to enforce such a lien has been brought in the superior court which ought to have been brought in a police, district or municipal court or before a trial justice, or if such action or proceeding has been brought in a police, district or municipal court or before a trial justice, which ought to have been brought in the superior court, if the error is discovered at any stage of the proceedings the court may, upon motion of any party thereto, order the action or proceeding,

with all the papers relating thereto, to be transferred to the proper court upon terms to the defendant; and it shall thereupon be entered and prosecuted as if it had been brought therein, and all prior proceedings otherwise regularly taken shall thereafter be valid.

SECTION 3. This act shall take effect upon its passage. [*Approved April 28, 1916.*]

C. 200.—AN ACT RELATIVE TO WORKMEN'S COMPENSATION AND LIABILITY INSURANCE.

SECTION 1. Any mutual liability company authorized to do business in this commonwealth may, with the approval of the insurance commissioner, have and exercise any or all of the rights, powers, and privileges relating to the transaction of the business of workmen's compensation insurance by law vested in or conferred upon the Massachusetts Employees Insurance Association.

SECTION 2. The Massachusetts Employees Insurance Association may, with the approval of the insurance commissioner, have and exercise, within or without the commonwealth, all of the rights, powers, and privileges vested in or conferred upon domestic mutual liability companies under general laws, and shall be subject to all the laws now or hereafter in force relating to such companies.

SECTION 3. This act shall take effect upon its passage. [*Approved May 12, 1916.*]

The only bill presented upon petition of this Association which was passed at this session of the legislature was the bill relating to Contingent Remainders, which now appears as

C. 108.— AN ACT RELATIVE TO CONTINGENT REMAINDERS.

SECTION 1. A contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use, and shall, as well as such limitations, be subject to the rule respecting remoteness known as the rule against perpetuities, exclusively of any other supposed rule respecting limitations to successive generations or double possibilities.

SECTION 2. This act shall take effect upon its passage, and, except so far as declaratory of existing law, shall apply only to instruments thereafter executed and to wills and codicils revived or confirmed by a will or codicil thereafter executed. [*Approved April 6, 1916.*]

The bill covers two rather narrow questions in the law of real property, and in view of its unusually technical language and application special reference is here made to the carefully prepared explanatory note by Mr. J. L. Thorndike, the original draftsman of the act, which was printed with the proposed act and sent to every member of this Association in the Report of the Committee on Legislation for 1914, pp. 53–56. This note was also printed in a four-page leaflet for the convenience of the legislature and those who are interested in the subject may obtain copies of this note by application to the Secretary so long as any spare copies remain. (See also Harv. Law Rev., Dec., 1914, p. 191.)

After the bill was introduced into the legislature this year, two cases, one involving each of the questions which the act seeks to avoid, have appeared in the English reports and furnish further evidence of the continued litigation in England caused by these questions. Those cases are *In re* Robson, L. R. (1916), 1 Ch. 116, and Mr. Charles Sweet's comments on the case in the Law Quarterly Review for January, 1916; and *In re* Clark's Settlement, Weekly Notes of Feb., 1916, p. 90.

C. 109 authorizes the Boston Municipal Court to appoint official interpreters for civil, in addition to the existing provision for criminal, business.

C. 122 amends the law relative to commitment and discharge of feeble-minded persons.

C. 128, that St. 1911, C. 75, requiring all special assessments to be placed on tax bills, "shall not apply to annual charges for the use of common sewers established by cities and towns" under R.L., C. 49, § 6.

C. 129, extending the powers of trust companies.

C. 130, that § 43 of Pt. 1, C. 490 of 1909, is amended to allow tax lists to be sworn to before "any notary public or justice of the peace in this commonwealth" as well as before assessors or their secretary or head clerk.

C. 131, that the form of bond of a collector or special collector of taxes shall be approved by the tax commissioner.

C. 135, relative to the contracts of insurance of life insurance companies.

C. 136, to give the State Forest Commission the right to take land by eminent domain "suitable for timber cultivation within the commonwealth."

C. 144, amending cl. 9, 13, and 14 of § 5 of Pt. 1 of C. 490 of 1909, relative to exemptions from taxation.

C. 148. — An Act relative to the dissolution of attachments.

Section one hundred and twenty-one of chapter one hundred and sixty-seven of the Revised Laws is hereby amended by adding at the end thereof the following: — When successive attachments in favor of different plaintiffs are made upon personal property the defendant may release from the attachments the property attached, or such portion thereof as he may elect, by giving bond with sufficient sureties to be approved as hereinbefore provided. The sheriff of the county in which the first attachment was made shall be the obligee on the bond, which shall be deposited immediately after it is given with the clerk of the courts for the same county, except that in Suffolk county it shall be deposited with the clerk of the superior court for civil business. The bond shall be conditioned on the defendant's paying to such sheriff within thirty days after final judgment in any such action or after the entry of a special judgment in any such action under the provisions of said chapter one hundred and seventy-seven, as the case may be, the amount fixed as the value of the property so released, and the amount so paid shall be held by the sheriff, after deducting the necessary charges, subject to the attachments in the order in which they were made, and shall be disposed of in the same manner as the proceeds of attached personal property sold under the provisions of section eighty-two of chapter one hundred and sixty-seven of the Revised Laws. [*Approved April 24, 1916.*]

C. 149, relative to untrue and misleading advertisements.

C. 150, extending the time for suit under the standard fire insurance policy in certain instances by adding "to the limitation of action clause" the fol-

lowing: "*provided, however*, that if, within said two years, in accordance with the provisions of the preceding paragraph, the amount of the loss shall have been referred to arbitration after failure of the parties to agree thereon, the limitation of time for bringing such suit or action shall in no event be less than 90 days after a valid award has been made upon such reference or after such reference or award has been expressly waived by the parties. If suit or action upon this policy is enjoined or abated, suit or action may be commenced at any time within one year after the dissolution of such injunction or the abatement of such suit or action, to the same extent as would be possible if there was no limitation of time provided herein for the bringing of such suit or action."

C. 173, to amend § 5 of Pt. 3 of C. 490 of 1909, in order to further "uniformity in valuation and assessment throughout the commonwealth" by providing that the tax commissioner "shall prepare and issue printed instructions to assessors as a guide to them in carrying out the said purpose. Such printed instructions shall be adapted to varying local circumstances and to differences in the character and condition of property subject to local taxation. He may furnish to local assessors blank forms for use in valuing such property."

C. 176, to require the tax commissioner to furnish the general court in 1917 and annually thereafter information as to revenue as follows:

In the year nineteen hundred and sixteen the tax commissioner shall ascertain the amount and kinds of personal property assessed in every city and town in the commonwealth under the description of "all other ratable" together with the amount of taxes assessed thereon, and shall include a statement thereof in his annual report upon "Polls, Property and Taxes." He shall also, on or before the first day of May in the year nineteen hundred and seventeen, and annually thereafter, inform the general court as to the amount of income assessed under any law for the taxation of income enacted in the year nineteen hundred and sixteen, and also an estimate of the probable amount of taxes that will be levied upon incomes under such act. The tax commissioner shall also, on or before said first day of May, transmit to the general court an estimate of the amount of "all other ratable" personal property that will be assessed in the several cities and towns in the year nineteen hundred and seventeen. Full authority is hereby given to the tax commissioner to require from the assessors of the several cities and towns such reports as may be necessary for carrying out the provisions of this act. [*Approved May 3, 1916.*]

C. 190, to authorize cities to establish Boards of Survey.

Resolves.

C. 30, to provide for a commission to consider the question of abolishing the trial justice system.

C. 75, directing the Board of Education to investigate the subject of special training for injured persons.

C. 81. — For a commission to revise and codify the laws relative to partitions of real estate and allied matters.

That a special commission of three persons be appointed by the governor, with the advice and consent of the council, to revise and codify the laws relating to partitions and partition sales of real estate, sales for distribution,

sales of real estate subject to reversions or vested or contingent remainders, or executory devise, assignments of dower, curtesy and homestead, and in fee to widows or widowers, and to the establishing and protecting of the rights of tenants in common, joint tenants, and of all persons having mortgages, attachments or other liens, on undivided interest in real estate. The commission shall report its recommendations, with bills embodying the same, to the next general court not later than the second Wednesday of January. The members of the commission shall receive such compensation, or may incur such expenses for legal and clerical assistance, and for other purposes, as the governor and council may from time to time approve: *provided*, that the total expense for compensation and other expenses shall not exceed the sum of one thousand dollars. [*Approved May 9, 1916.*]

F. W. G.

C. 208, WAGE ASSIGNMENTS LAW, imposes two new restrictions on assignments given for any purpose other than to secure loans of money of less than $300. Three-quarters of the wages earned are at all times exempt from assignment and no assignment is valid unless it so states on its face. No married man can legally assign his wages unless his wife's consent in writing is attached to the assignment.

The wage assignment statutes have been so often amended that some confusion has resulted. The present state of the law may be summarized thus:

As to *Assignments to secure loans of less than $300. Acts of 1911, c. 727, sect. 22.*	*As to* *All other assignments. Acts of 1909, c. 514, sect. 121–4, as amended by Acts of 1916, c. 208.*
1. $10 per week exempt.	1. Three-quarters of wages exempt.
2. Employer must consent.	2. Employer need not consent.
3. Wife must consent.	3. Wife must consent.
4. Valid for only one year.	4. Valid for two years.
Acts of 1912, c. 675, sect. 6, establishes standard form of assignment.	Standard form established.

R. H. S.

C. 224, SMALL LOANS ACT, makes a very substantial change in the small loans law. Acts of 1911, c. 727, which created the office of supervisor of loan agencies, limited the rate of interest on loans under $300 to three per cent per month, but permitted "expenses" to be charged in addition. Under the rules established by the supervisor's office since 1912, lenders have been allowed to charge for "expenses" from 10 to 12 per cent in addition to the interest.

The new law prescribes that the maximum charge, including both interest and expenses, shall not exceed three per cent per month. All fees, charges, etc., in excess of this rate are prohibited. The law was so drafted that three per cent per month is fixed only as a rate. Therefore, where a loan is made for a year, more than three per cent can be charged the first month provided the interest charges in the aggregate do not exceed 36 per cent for the year.

The rate is to be computed on the amount actually received by the borrower; and if the principal is repaid in installments, the rate is required to be computed only on the unpaid balances.

R. H. S.

QUARTERLY DIGEST OF MASSACHUSETTS DECISIONS.

INTRODUCTORY STATEMENT.

This installment of the digest contains all cases in Volume 222 not stated in the February number and most of the cases in Volume 223 which were reported up to the middle of March.

The present installment contains a number of important cases. In stating some of these the plan has been adopted of quoting explanatory passages from the opinion which the bar is likely to find convenient. This extends the digest somewhat, but one of the objects in experimenting with this digest is to furnish, not merely a digest, but, so far as practicable, an abbreviated statement of the grounds of the opinions as a more convenient medium of following the substantial development of current decisions than the reading of the extended opinions in all cases. Criticism will be welcomed.

ADVERSE POSSESSION. — Petition for registration of title to about 40 acres called "Oliver's Neck." The evidence showed that "one Burgess, a predecessor of the petitioners who obtained title in 1867, went upon the land in that year and also in 1868, cut the timber from both sides, and all the timber from the narrow portion of 'Oliver's Neck,' the designation by which the tract in dispute has been known from colonial times. The cutting took place in the presence of one Miller and one Tisdale, under each of whom the respondent alleges title. It was further shown that Burgess built a sledge-road through the Neck, kept the underbrush cut, and when in 1873 he parted with the title his grantees entered into possession and erected camp buildings, consisting of a stable, cabin, cook house and boat house, which were kept locked, the owners only holding keys. The land, although not cultivated, was thereafter kept cleared around the buildings, and nearly 30 years ago the ancient wooden fence across the 'Neck' was replaced by a wire fence with a gate, which has been maintained and the gate kept locked by the parties in possession. The buildings ever since have been occupied two or three times each year for about a week, for the purpose of hunting, fishing, rest, and recreation." *Held:* The finding by the Land Court of a title proper for registration was warranted. (*Keith* v. *Kennard*, 222 Mass. 398.)

AGENCY — SCOPE. — Defendant, a foreign steamship company, used the pier of the plaintiff carrier under agreement by which plaintiff's cars were brought on to pier for unloading, after order from defendant under plaintiff Railroad's tariff agreement filed with Interstate Commerce Commission, which provided for thirty days' free storage in cars on export freight and a fixed charge for any longer period. Owing to a strike of the defendant's longshoremen a number of cars were necessarily stored for more than thirty days, and plaintiff's representative, feeling bound to collect, in accordance with its tariff filed as above, had an interview with the defendant's agent, who held a

general power of attorney "to manage and transact its business" in the United States and to make contracts in the ordinary course of its business, and to bring, defend, compromise, or abandon actions, etc. In order to avoid the necessity of application by the plaintiff to the shippers, it was agreed that the plaintiff should apply to the Interstate Commerce Commission for a ruling whether these charges, resulting from a strike, were payable, and that if the Commission decided that they were, the defendant would pay. The Commission ruled that the charges could not be waived by the plaintiff and the defendant company then repudiated the agreement of its manager. *Held:* The agreement was within the agent's authority. Exceptions to finding for the defendant sustained and judgment entered for plaintiff under St. 1909, c. 236. (*N. Y., N. H. & H. R.R. Co.* v. *Leyland Co.*, 222 Mass.)

ALIMONY — PETITION BY WIFE AFTER DIVORCE GRANTED AGAINST HER. — After a decree *nisi* in favor of the husband against the wife for desertion and before the decree became absolute he promised to pay her $9 a week as long as she lived, or until she remarried. He paid it until after he remarried and then stopped, as his entire income of $20 a week was needed for his new household. The divorced wife petitioned for alimony and the Superior Court found the above facts and dismissed the petition. On exceptions, *Held:* "The question whether the petitioner was entitled to alimony (under R.L. 152) was a matter within the sound discretion of the trial judge. . . . Exceptions overruled." (*Brown* v. *Brown*, 222 Mass. 415.)

APPEAL IN EQUITY — "PARTY AGGRIEVED." — A sued B and C in equity and obtained an injunction which was dissolved by a joint bond of B and C and surety. The final decree ordered B to pay A $6,782.59 and dismissed the bill as to C. C appealed, but B did not. *Held:* C could not appeal as he was not "a party . . . aggrieved." His trouble, if any, "arises out of the fact that he . . . executed a bond, not because he is a party to the suit." *Farrar* v. *Parker*, 3 Allen, 556, allowing a probate appeal by the surety on a guardian's bond is distinguished, as probate appeals include "a wider range of persons than those entitled to an appeal in other courts." (*Donovan* v. *Donovan*, 223 Mass. 6.)

BAILEE FOR HIRE — CLOTHES TO BE CLEANSED DESTROYED BY FIRE — BANKRUPTCY MORE THAN FOUR MONTHS AFTER SUIT AND DEPOSIT "IN LIEU OF AN ATTACHMENT BOND." — *Held:* 1st, Evidence warranted finding that as bailee for hire the defendant was responsible for destruction of the clothes. 2d, Bankruptcy of the defendant having taken place more than four months after suit "as no attachment was ever made or bond given to dissolve an attachment, or payment of money into court shown . . . the agreement that the money deposited by the defendant with the plaintiff's attorney 'in lieu of an attachment bond' should be held to await the termination of the suit, and then if the plaintiff recovered, applied in satisfaction of the judgment, is not within the provisions of our statute (R.L., c. 177, §§ 24, 25, Bankruptcy Act 1898, § 17, § 67, sub § c.), and is unenforceable." Bankruptcy, therefore, barred the action and no special judgment could be entered. Order of Appellate Division of the Boston Municipal Court affirmed. (*Fingold* v. *Schacter*, 223 Mass., March 3.)

BANKRUPTCY — PREFERENCE — EQUITABLE RIGHT OF SET-OFF BANK DEPOSIT AGAINST UNMATURED NOTES WITHIN FOUR MONTHS — RESULT SUSTAINED FOR REASON NOT GIVEN IN COURT BELOW — COMMON LAW RIGHT OF ANNULMENT OF CREDIT AND REPOSSESSION OF FUNDS — "REASONABLE CAUSE TO BELIEVE" AS TO PREFERENCE.— Suit by trustee in bankruptcy of A to recover alleged preferences. A, a stranger, was introduced to the defendant bank on December 22, 1911, as reliable by his attorney, who was favorably known to the bank. A thereupon applied for a loan of $10,000, offering his notes indorsed by B. The bank on inquiry of other banks was satisfied with B's credit and discounted three time notes, totalling $10,000, carrying the proceeds on deposit to account of A. Having then notified B of the loan, the bank was told by B's son, on December 27, that B never signed the notes. The bank sent for A, told him, and asked him to take up the notes at once. A declared the endorsements genuine, but agreed to take up the notes, gave his check for $5,500, being his entire balance except $21.26, and promised to pay the balance of the notes on that day or the next. He appeared again on January 2, 9, and 16, and each time deposited $500 and gave the bank a check for it. He was insolvent on December 22, and was petitioned into bankruptcy on January 27. The single justice decided that the $5,500 on December 27 was not a preference, but that the subsequent payments of $1,500 were. Both parties appealed. *Held:* 1st, Although "generally instances of the right of set-off have occurred either at the adjudication . . . or if beforehand then when the note of the bank was due or overdue" and "statements to the effect that the right of set off may be exercised only when the note has matured are to be found in some of the cases," and "in this Commonwealth there is no right to set-off of an unmatured note even in cases when the other party is insolvent;" yet "this rule, which sometimes appears harsh in operation, does not prevail in equity in the Federal Courts" and the principle of equitable set-off under the Bankruptcy Act, as stated in *Studley* v. *Boylston Nat. Bank*, 229 U.S. 523, "seems . . . phrased advisedly . . . to be equally applicable . . . at a time when there is in fact bankruptcy, although not manifested by proceedings in court. The principle declared is not restricted to matured notes." . . . "That principle is that the parties lawfully may do beforehand the exact thing which the law requires to be done when bankruptcy is established." . . . "If done before bankruptcy, then the question of preference becomes involved and must be determined" and here the finding that the bank did not have reasonable cause to believe that its receipt of the $5,500 would result in a preference was wrong, but 2d, the result is supported because the loan and discount of five days before were rescinded by the bank under its common law right. 3d, There was "reasonable cause to believe" in a preference as to the later payments of $1,500. (*Putnam, Tr.*, v. *United States Trust Co.*, 223 Mass. 199.)

BANKRUPTCY — PREFERENCE DETERMINED AS OF DATE OF FILING PETITION — RECOVERY WITHOUT REPAYMENT OF ADVANCES TO CARRY DEBTOR OVER FOUR MONTHS AND THUS PROTECT ASSIGNMENT FROM ATTACK. — Case previously reported 220 Mass. 156. Suit by trustee in bankruptcy to recover value of accounts assigned within four months as a preference. *Held:* 1st, Finding that the accounts were the property of the bankrupt sustained. 2d, Finding of insolvency justified by adding to the personal debts the debts of the partnership "of which (the bankrupt) was a member,

for the debts of which he was . . liable jointly with his partner and whose debts on its dissolution he had agreed to pay." 3d, It was held, when the case was here before, that individual creditors and partnership creditors were not of the same class. Following and applying that decision, the trial judge found that "If the effect of the enforcement of the transfer to Lottow be determined as of July 30, I find that Lottow would not obtain a greater percentage of his debt than other creditors of the same class. If the said effect is to be determined as of October third, I find that it would enable Lottow to obtain a much greater percentage." An examination of the evidence discloses no reason why this finding of fact should be overturned. The question of law which arises in the light of these facts is whether in bankruptcy the preferential character of a transfer of property is to be determined as of the date of the transfer, July 30, 1912, or of the filing of the petition in bankruptcy, Oct. 3, 1912.

"We are of opinion that the judge ruled rightly that the decisive date was that of filing the petition" (as to § 60 a and b of the bankruptcy act). "It seems to us that the answer is that a reasonable cause to believe that his conduct in receiving a transfer will result in a preference if enforced at the time of bankruptcy is the precise meaning of this provision. . . . The degree of insolvency preceding a petition in bankruptcy is often progressive, and that fact usually must be within the contemplation of the ordinary business man accepting a transfer from his bankrupt debtor. . . . We think a transfer under such conditions becomes voidable by the trustee if the other necessary elements are present.

It follows that the standard established by the words of the act in this connection is that of practical results. It does not justify resort to the uncertainties of the theoretical inquiry as to what might have happened if bankruptcy had come at a different time from that when it actually did come. . . .

While the precise point here presented does not appear to have been decided, the result we have reached is in harmony with what has been assumed in numerous cases." 4th, Finding "of reasonable cause to believe" justified. 5th, 220 Mass. 156, reaffirmed that money advanced in return for assignment of accounts to tide over the four months and thus protect the assignment from attack need not be returned as a condition of recovering the value of the accounts. "Such a transaction was held to be a fraud on the law. It is something more than a mere preference. . . . It is a wrong quite outside any express prohibition of the Bankruptcy Act." (*Rubenstein, Tr.*, v. *Lottow*, 223 Mass., March 3.)

Brokers' Commission. — On appeal from the Appellate Division of the Boston Municipal Court *held* the brokers' commission was earned when the defendant accepted the offer, procured and executed an agreement for the sale of real estate and subsequent rescission of that agreement did not affect the broker's right. Order of Appellate Division affirmed. (*Harrington Co.* v. *Waban Rose Conservatories*, 222 Mass. 372.)

Carrier — Mistaken Address in Bill of Lading Protects Carrier. — Contract for failure to deliver goods. Plaintiff engaged an expressman to take to the defendant company for transportation a box plainly addressed "Mary Williams *Munnerlyn* Georgia Burke Co." The expressman delivered the box to the defendant and accepted a bill of lading in which he was

described as the shipper, and the address written "Mary Williams *Waynesboro* Georgia." This he delivered on the same day to the plaintiff, who noticed the mistake, but did nothing until three months later, when she claimed for loss by misdelivery, and then sued as undisclosed principal. Verdict for plaintiff. On exceptions, *Held:* The jury should have been instructed that the plaintiff could not recover. Exceptions sustained. (*Porter* v. *Ocean S.S. Co.*, 223 Mass. 224.)

Carrier — Perishable Goods — Local or Special Custom. — Contract for damage to a carload of onions shipped October 15 from South Deerfield by plaintiff, consigned to itself at Hartford with instructions in the bill of lading to notify A. The car arrived October 16 and the defendant carrier notified A, who did not call for the onions, and the defendant did not notify plaintiff of this until October 29 in answer to plaintiff's telegram. Meanwhile some of the onions sprouted and decayed. Verdict for plaintiff. On exceptions, *Held:* "If not in contravention of established rules of law and in the absence of any provision to the contrary a local or special custom regulating delivery . . . forms part of the contract of shipment" and a finding of a custom of notice to shipper within 48 hours of non-acceptance and that the plaintiff relied on it was warranted. 2d, Keeping onions in a closed car for 14 days in October was evidence of negligence. Exceptions overruled. (*South Deerfield, etc., Co* v. *N.Y., N.H. & H. R.R.*, 222 Mass. 535.)

Cemetery Lot — Revocable License to Bury — Evidence. — Bill in equity by a holder of a certificate for a burial lot against the pastor in charge of the cemetery. By the certificate "the right is granted to him (plaintiff) and the Roman Catholic members of his family to bury" in a certain lot in a conspicuous part of the cemetery "subject to the . . . regulations or such others as may be from time to time prescribed in relation to burials in said cemetery. . . . It is to be expressly understood that this certificate is not a conveyance of real estate, nor does it confer any right to sell or transfer the lot herein mentioned." While the plaintiff was choosing his lot, and before the certificate was issued to him, the defendant explained that the plaintiff must grade and care for the lot, as the price for the lot was made low on that understanding, and if it was not done any remains buried in the lot might be removed. It was found that the plaintiff did not object to these terms, and that they formed part of the agreement. The plaintiff then buried his mother's body in the lot, and left the lot entirely uncared for during more than four years, when the defendant caused the remains of the plaintiff's mother to be removed to another part of the cemetery without the plaintiff's knowledge or consent. The plaintiff sought to be allowed to restore his mother's remains to the lot, to recover the cost and damages, and for an injunction against future interference. The Court below dismissed the bill. *Held:* The parole evidence rule is not applicable, as the certificate expressly contemplated alterations, etc., and on all the evidence we cannot say that the findings or order of the Court below were clearly wrong. (*Green* v. *Danahy*, 223 Mass. 1.)

Certiorari — Appeal — Review — Removals by Mayor Subject to "Review" by Court. — Petitions for Certiorari to the Justices of the Superior Court to correct errors in proceedings relating to the review of the removals of the petitioners as license commissioners by the Mayor of New

Bedford. The statute providing for removal after hearing by the Mayor further provided, on application to the Superior Court for "a review of the charges, of the evidence submitted thereunder, and of the findings thereon by the Mayor" and that "The Court, after hearing, shall affirm or revoke the order of the Mayor . . . and there shall be no appeal from his (*i.e.*, the Superior Court Judge's) decision." The Superior Court had refused on application to revoke the removals of the petitioners. *Held:* 1st, The words "there shall be no appeal" do not prevent "an aggrieved party from invoking the writ of certiorari in appropriate instances." "Doubtless 'the word "appeal" is used in a broad general sense' so as to cover all the ordinary proceedings for a revision. . . . But the writ of certiorari is of extraordinary nature. It is one of the ancient prerogative writs whose history stretches far back toward the beginnings of the common law. Its common purpose is the beneficent one of enabling a party who has no remedy by appeal, etc. . . . to bring the true record . . . before a higher court for examination as to material mistakes of law. . . . Its appropriate function is to relieve . . . from injustice arising from errors of law . . . when no other means of relief are open. . . . The writ . . . has been sedulously preserved" by statutes giving the Supreme Judicial Court general superintendence "to correct and prevent errors and abuses" in all courts of inferior jurisdiction "if no other remedy is expressly provided." (R.L., c. 156, § 3; c. 192, § 4.) "It would require words unmistakable in import to express a legislative purpose to deprive parties to any appropriate proceedings from the shelter of this writ." 2d, The long established rule of the Superior Court in dealing with such cases, stated in this case as follows: "The Court must therefore consider the questions here involved, bearing in mind that the finding of the mayor as to facts must stand if supported by reasonable evidence, and that it is not sufficient to overthrow such finding that the Court might feel that a consideration of the evidence uncontrolled by the finding might lead to a different result," is "the sound view" of the statutory provision for "a review of the charges" as distinguished from an "appeal" or entire rehearing. 3d, On consideration of the record there is no occasion for issuing the writ. Petitions dismissed. (*Swan* v. *Justices of the Superior Court*, 222 Mass. 542.)

Constitutional Law — Act giving Citizens Preference over Aliens in Public Employment. — Taxpayers petition against city officials of Lynn to enjoin discharge of aliens and preference to citizens in employing "mechanics and laborers" under St. 1914, c. 600, and 1909, c. 514, § 21, as amended by 1914, c. 474. *Held:* "In substance these acts require that 'in the employment of mechanics and laborers in the construction of public works by the Commonwealth, any county, city or town, or by persons contracting therewith, preference shall be given to citizens of the Commonwealth;' and that, 'in all work of any branch of the service of the Commonwealth, or of any city or town,' a like preference shall be given.

Since the argument of the case at bar, the federal questions involved have been decided adversely to the contentions of the plaintiff. (*Heim* v. *McCall*, 239 U.S. 175; *Crane* v. *New York*, 239 U.S. 634.) By these decisions statutes of other states, indistinguishable so far as concerns their constitutionality . . . from those here attacked, have been upheld as not violative of any right protected by the federal constitution or secured by treaty of the United States with Italy and by other treaties containing 'the Most Favored Nation

Clause.' On the authority of these cases, it must be held without further discussion that the instant statutes are not inconsistent with the federal constitution and treaties.

While the provisions of our constitution are not in the same words as those of the United States constitution upon this subject, . . . these statutes are not in conflict with the State constitution. The decision upon this point is concluded in principle by *Woods* v. *Woburn*, 220 Mass. 416, following the . . . Opinion of Justices, 208 Mass. 619, where the power of the legislature was upheld to fix the number of hours which shall constitute a day's labor for employees of the Commonwealth and its governmental subdivisions, and by the reasoning of the decisions of the United States Supreme Court just cited. The cities and towns of the Commonwealth are divisions of government established in the public interests. The legislature is supreme in the control of these governmental instrumentalities, subject to the provisions of the constitution. In its representative capacity, within appropriate functions of legislation, the General Court stands in the position of employer. It may establish general rules for the employment of labor. Since it is a public agency directing the expenditure of money raised by taxation, it cannot make arbitrary discrimination and favor the employment of one class of citizens to the exclusion of others. But a preference of citizens over aliens in the public service is not favoritism among the subjects of the Commonwealth. Aliens are not members of the State in the strict sense. Statutory discriminations in favor of citizens and against aliens have been upheld. In *Commonwealth* v. *Hilton*, 174 Mass. 29, regulations restricting to inhabitants the right to take clams were sustained, and in *Commonwealth* v. *Hana*, 195 Mass. 262, a requirement that licenses to pedlers should be granted only to those who had declared an intention to become citizens was held to be valid. Where the State, either directly or through its governmental departments, acts as proprietor or employer, a determination not to engage aliens in its service cannot be pronounced unreasonable or violative of any constitutional mandate.

The distinction between laws passed by the legislature regulating the conduct of the State and its departments and subdivisions as employer, which are within its right, and similar laws designed to control the conduct of the general public, is adverted to in *Truax* v. *Raich*, 239 U.S. 33. A law of the latter class there was held to fall under the condemnation of the fundamental law. But the present statutes belong plainly to the former class." (*Lee* v. *Lynn*, 223 Mass. 109.)

Constitutional Law — Act Providing Alternative City Charters — Power of Removal — Repeal of Special Acts — Mandamus. — Petition for mandamus to compel the Mayor of Cambridge to refrain from attempting to remove the Commissioner of Public Safety. The Commissioner was appointed under St. 1912, c. 611, which empowered the Mayor to "remove the Commissioner for cause after a hearing." At the State election in 1915 the voters of Cambridge adopted Plan B of the four model charters offered to cities by Chapter 267 of 1915. That act provided that the plan should "supersede the provisions of its Charter and of the general and special laws relating thereto and inconsistent herewith," and the Plan B adopted by Cambridge required "the approval of a majority of the members of the City Council" for removals of "any head of a department." After the adoption of Plan B the Mayor undertook to remove the Commissioner under the Act

of 1912 without the approval of the Council. *Held:* 1st, The act giving existing cities the option of alternative charters is constitutional, and differs from Chapter 377 of 1892, which gave towns the option of becoming cities under various forms of charter, and which was held unconstitutional in *Larcom* v. *Olin*, 160 Mass. 102. 2d, The act of 1912 is repealed, and the Commissioner cannot be removed by the Mayor without the approval of the Council. Writ to issue. (*Cunningham* v. *Mayor of Cambridge*, 222 Mass. 574.)

Contract for Cabbage of Specific Quality — Buyer's Right to Inspect — Foreign Law. — Plaintiffs, in New York, offered to ship two carloads of "fine stock" cabbages, and defendant in Boston accepted. Cabbages were shipped under bill of lading, so that defendant could not inspect without subsequent permission, and he did not get it till 20 days after arrival, and then refused the cabbages. *Held:* 1st, There being evidence on which the jury might find that under the contract defendant had a right to inspect before paying drafts, and that loss from failure to ship so as to allow inspection ought to fall on plaintiff, it was error to instruct the jury that the loss would fall on plaintiff only if defendant requested his right in reasonable time and was denied. 2d, Both parties assumed that New York law governed and introduced evidence. The judge told the jury the rule of law established by a case put in by the defendant. "But if there was a question upon the point it was . . . to be decided by the jury, not by the Court." (*Paddleford* v. *Lane & Co., Inc.*, 223 Mass.)

Contract — Inducement to Make Home for Father-in-Law. — *Held:* The jury were warranted in finding that the defendant offered plaintiff, who had left her husband (because he drank) and supported her child by working in a mill, one-half a mortgage of $2,000 if she would come back and "make a home with her husband for the defendant," and she having done so, the fact that father-in-law then remarried and departed did not excuse him from paying the $1,000. (*St. John* v. *St. John*, 223 Mass. 137.)

Contract — Rent. — *Held:* Nothing to show that finding for plaintiff was wrong. (*Wyche* v. *Uebelhoer*, 223 Mass., March 6.)

Contract — Unsafe Plans for Structure no Excuse for Failure to Erect. — Cross actions. A contractor, by written contract, agreed with a committee "to supply the material and do the construction of a grand-stand . . . in accordance with plans and specifications drawn up and submitted by (a specified) engineer." After partial performance an important concrete slab broke when its supports were removed, and the contractor refused to complete with the original plans, etc., but offered to finish if suitable plans, etc., were furnished. Both parties sued for damages. Verdict ordered for the committee. On exceptions, *Held:* A contractor must consider the possibility of the work before agreement "or insist upon some stipulation covering the matter." If "he makes a general contract without fraud or mutual mistake," and "it turns out that he has agreed to do something which is impossible or impracticable, he cannot, for that reason alone, refuse to go forward." There were no circumstances here to show an implied warranty of safety by the committee. Exceptions overruled. (*N. J. Magnan C.* v. *Fuller*, 222 Mass. 530.)

CONVERSION — SALES OF MERCHANDISE IN BULK — STATUTE NOT AVOIDED BY MORTGAGE AND RELEASE. — Tort for conversion brought by a deputy sheriff against a constable. A retail grocer owed a wholesale company $200, and on May 10 mortgaged to the company his entire stock and fixtures, worth $100, to secure the debt. Subsequently on the same day he released his equity to the mortgagee. The mortgage was not recorded. The mortgagee immediately took possession "under a claim of ownership," and left the retailer in charge under a written agreement by him to hold for the company's benefit and account for receipts without deduction. No notice under the "sales in bulk act," 1903, c. 415, was given. May 13, a creditor of the retailer attached the property and the plaintiff deputy sheriff took possession under the writ. The wholesale company demanded the property and then brought a replevin writ under which the defendant constable seized the goods. No replevin bond was executed nor was the replevin suit entered. The Court found nominal damages for the plaintiff. On exceptions by the plaintiff, *Held:* 1st, The plaintiff had actual possession and a special property and, "save as justified by law, the seizure of the defendant was a trespass and he became a trespasser *ab initio*" on failure to enter the replevin writ, and the plaintiff entitled to the full value of the goods. 2d, "The effect of the mortgage and release was to transfer the absolute legal title . . . and, if allowed, . . . to defeat the statute. We cannot give countenance to any device calculated to produce such result." The title was voidable by creditors and, as the mortgage was not recorded, and taking possession "under a claim of ownership" was not under the mortgage, it is unnecessary to determine whether leaving the mortgagor in charge was a compliance with R L., c. 198, § 1, as to possession and retention of possession. Exceptions sustained. (*Mills* v. *Sullivan*, 222 Mass. 507.)

CORPORATION — DE FACTO DIRECTORS. — "Persons assuming to act as the directors of a corporation, who represent a minority of the stockholders and never legally were elected directors, although they might be treated as *de facto* directors in transactions with third persons, have no authority to authorize counsel to bring a suit in the name of the corporation, which is without business or assets, in a factional controversy between rival boards of directors, mainly for the purpose of affecting the property rights of the majority of the stockholders or of imposing a liability upon them; and in such a suit a plea in abatement alleging that the suit was brought in the name of the corporation without authority will be sustained." (*Stratton. Mass. Gold Mines Co.*, v. *Davis*, 222 Mass. 549.)

CORPORATION — STOCK SUBSCRIPTION — SPECIFIC PERFORMANCE. — The defendant owned patents, etc., and with two others organized the plaintiff corporation and orally subscribed for 900 out of 1,000 shares, agreeing to pay for them with the patents, etc., and such payment was certified by a majority of the directors as full payment of the subscription price of $90,000 in the record of the first meeting and in the certificate of organization. The stock was issued to him, but he did not assign the patents, etc., and later he made an agreement with the directors by which he was to sell the patents, etc., to the company for $15,000. The terms of this agreement were not complied with by the plaintiff company, the defendant still kept the patents and the plaintiff filed a bill for specific performance of the stock subscription under which the stock was issued to the defendant. *Held:* No formal contract of

subscription is necessary when a certificate for shares is accepted by one who has consented to become a stockholder. The finding that the defendant subscribed for the 900 shares issued to him was warranted and nothing appeared to release him. The agreement under which the plaintiff was to pay the defendant $15,000 for an assignment of the patents released him from the prior obligation to pay by such assignment, but did not affect his subscription for the shares. "Any secret or other agreement . . . between the defendant and the other subscribers, to which the corporation was not a party . . . is not binding upon the corporation." Decree "ordering the defendant to pay the full amount of his subscription in cash or at his option to assign to the plaintiff the patents." (*Bridgeport, etc., Co.* v. *Osborne*, 222 Mass. 516.)

Corporation — Tortious Liability of Officer for Malicious Interference with Performance of Corporate Obligations — Survival of Action — Assignability. — At law on demurrer. The declaration by alleged assignees of preferred stockholders against the administrators of a deceased treasurer and director alleged that the deceased "did maliciously induce" the directors to violate an agreement as to the payment of cumulative dividends when sufficient net proceeds were available. The stockholders' agreement under which the plaintiffs acted contained an irrevocable power of attorney "to do such acts as the committee shall from time to time consider essential for the protection of the rights and interests of the depositors." *Held:* 1, "Assuming that the allegation 'did maliciously induce' was intended to have and does have a meaning likened unto a charge of spite, ill will, fraud or bad faith in contradistinction to its usual meaning of knowledge of plaintiffs' rights and an unjustifiable interference therewith, the declaration states a case of violation of the preferred stockholders' rights *in rem*. In this case the right to have the directors act, should they so desire, with a judgment untainted by Mayo's corrupting influence was a personal right and Mayo's violation of this right was a personal wrong to each of the several stockholders, for which damages might be awarded in an action of tort," yet 2, the action did not survive and 3, the stockholders' agreement, above quoted, is "not sufficiently definite or comprehensive to include a claim for damages for a tortious wrong to each individual stockholder." 4, The cause of action was not assignable. Demurrer sustained. (*Lee et al.* v. *Fisk et al., admrs.*, 222 Mass. 418.)

A bill in equity was also filed stating the above facts in amplified form. *Held:* The decision in the law case "is decisive of this suit unless the personal representatives have benefited by the intestate's wrong, or unless Mayo held toward the preferred stockholders a fiduciary relation." There was no allegation or inference of benefit to the estate.

"The bill asks for an account as a means to an end. . . .

A bill in equity will not lie for such a purpose because the remedy at law is adequate . . . (*Phillips* v. *Phillips*, 9 Hare, 471). Indeed a bill for an accounting, in the absence of complications or of fiduciary relations between the parties, does not lie unless each of the two parties has received and paid on the other's account. (*Phillips* v. *Phillips*, *supra*; *Hemings* v. *Pugh*, 4 Giff. 456; *Pratt* v. *Tuttle*, 136 Mass. 233.)

It may be conceded that the relation which the treasurer and directors of a corporation bear to it is fiduciary. . . . but we are unable to find any authority for the position that that relation to the corporation extends to individual stockholders." Demurrer sustained. (*Lee* v. *Fisk*, 222 Mass. 424.)

CRIMINAL LAW — CONSTITUTIONAL LAW — ST. 1913, C. 563 AS TO NON-SUPPORT OF ILLEGITIMATE CHILDREN ALREADY BORN NOT EX POST FACTO. *Held:* 1st, as above. 2d, The fact that the mother has married and her husband has supported the child does not relieve the father of the child of his statutory duty. The evidence warranted a conviction. (*Com.* v. *Callaghan*, 223 Mass. 150.)

CRIMINAL LAW — NON-SUPPORT — FALSE ANTE-NUPTIAL REPRESENTATIONS OF WIFE AS TO CHASTITY INADMISSIBLE. Conviction under St. 1911, c. 456, § 1, for refusal to support. Defendant excepted to exclusion of the representations above mentioned. *Held:* It was "correctly ruled that only evidence of her conduct since the marriage was admissible in justification of the defendant's failure to support." Exceptions overruled. (*Com.* v. *Shaman*, 223 Mass. 62.)

CRIMINAL LAW — PLEADING — LARCENY BY FALSE PRETENSES — EVIDENCE — "SELLERS' TALK" — SIMILAR ACTS — ASSESSORS' RECORDS. — *Held:* 1st, An indictment and bill of particulars accurately charging larceny by false pretenses will not be quashed because they contain some immaterial or some insufficient allegations. 2d, A statement by a defendant that he had been offered $42,000 for certain land being "sellers' talk" within the rule of *Caveat Emptor* is not a ground of civil liability even if false and intended to deceive, and "with stronger reason . . . cannot be held to constitute a criminal offence." "We do not mean to intimate that a seller would not be civilly and criminally liable if false statements as to the price paid or offers received for the property sold are accompanied by deliberate affirmations having a tendency more effectually to deceive the purchaser." (See *Way* v. *Ryther*, 165 Mass. 226, 229.)

"While the exceptions to the admissibility of this evidence as a false representation of a material fact must be sustained, we are of opinion that the decisions in favor of vendors' representations should not be extended." (See *Mabardy* v. *McHugh*, 202 Mass. 148, 149.) 3d, Statements that a person was a wealthy manufacturer or a man of financial responsibility owning real estate in a certain city could have been found to be false statements of material facts. 4th, Evidence of similar representations to another in a separate transaction was erroneously admitted to show intent, as it did not appear that the other person was defrauded or that the other transaction was not perfectly fair. 5th, An assessor's testimony that a man was not assessed for any property in a city was not admissible to show that he did not own land there or that he was without financial responsibility. "We do not mean to intimate that the (assessor's) *records* would have been competent." (*Enfield* v. *Woods*, 212 Mass. 547 distinguished.) Exceptions sustained. (*Com.* v. *Quinn*, 222 Mass. 504.)

DEED — ASSUMPTION OF MORTGAGE BY GRANTEE — CONSTRUCTION — PRIVILEGE OF EXTENSION.—Action for breach of agreement to assume and pay a mortgage. The plaintiff placed a mortgage on her twelve acres for $4,000 for five years, with a privilege of prepaying $1,000 on interest dates, "and this mortgage may be extended for the further term of three years . . . for the balance then due . . ." The plaintiff later conveyed eight acres to the defendant by deed, reciting that the defendant "by acceptance of this deed assumes and agrees to pay said mortgage . . . and to make or cause to be made to or for the benefit of . . . (the plaintiff,

etc.) a . . . release from the operation of said mortgage of that part of the land included therein not in this conveyance described." The actual consideration was $500, and "the agreement implied in law by . . . acceptance of the deed." Five days before maturity, the mortgagee and the defendant extended the mortgage for the whole amount of $4,000 for three years from its maturity, "in accordance with the provisions therein contained." On learning of this the plaintiff requested the defendant to relieve her and her remaining four acres from the liability. This the defendant tried to do, but the mortgagee refused to accept payment. Then this action was brought. *Held:* 1st, The use of the word "balance" did not limit the privilege of extension to a case where prepayment had been made. 2d, The obligation which the defendant assumed was to pay the mortgage debt with the privilege of extension for three years. Judgment for defendant. (*Dawson* v. *Grote*, 222 Mass. 243.)

Deed — Equitable Restrictions — Abandonment — "Porte Cochere." — Petition for registration of title to certain lots out of an original parcel which was divided into 13 lots by plan and the deeds of which contained restrictions, including a 25-foot set-back on most of the lots. The original deeds in 1849 by Wilkins who divided the lots provided "It is hereby understood and agreed that no buildings, etc. . . . these same restrictions applying to all the lots on easterly (opposite) side of said avenue and now owned by Wilkins, except lot 8." In 1849 lots 1–3 were thus conveyed to A and the other lots (4–13) by mesne conveyances to B, who in 1853 conveyed lot 4 to A, subject to the restrictions. In 1859 when A owned lots 1–4 and B lots 5–13, each took from Wilkins on the same day a release of all his "right, title, and interest," "meaning and intending hereby to release and discharge any conditions, restrictions, or limitations annexed to said premises by my said deeds" and on the following day B released to A the restrictions on lot 4 which he had conveyed to A in 1853, and about nine months later B accepted from C a release of the restrictions on lot 6 which C had acquired from Wilkins, subject to restrictions in 1849, and conveyed to B in 1850. Lot 7, which because of its shape and position away from the avenue had no set-back restriction imposed upon it, was conveyed to D by Wilkins in 1849, and by D to B in 1859, but apparently there was no attempt made to release the restrictions on this lot. Since 1859 no reference to restrictions appeared in deeds of the lots. The question was whether the petitioners' lots 5–13 were still subject to the restrictions. The Land Court found that the original restrictions were in accordance with a general scheme, but had been abandoned. On exceptions, *Held:* 1st, The deeds showed a general scheme and created equitable restrictions on the lots which could not be abandoned by mere non-user. 2d, Here there was no evidence showing an unequivocal purpose to abandon, or relinquish. 3d, A finding that the respondents maintain a "porte-cochere" within the restricted area in violation of the restrictions is not sufficiently definite to indicate the nature of the structure. "Porte-cochere" is defined as a large gateway allowing vehicles to drive into a court-yard. Sometimes in the United States it is applied erroneously to a covered carriage way." Exceptions sustained. (*Hartt* v. *Rueter*, 223 Mass. 207.)

Note.

Interesting questions have been suggested by this case — whether an assumption apparent of record by all the owners of restricted lots and their grantors that the restrictions were personal covenants between grantor and

grantee and not attached to the land, and the consequent delivery by each grantor and acceptance by each grantee of a release showing an intention to extinguish the restrictions, does not show an estoppel of record against the successors in title of an owner who gave and accepted such releases, to enforce the restrictions? May not a scheme of general intention to extinguish a restriction be effective upon the same principle that gave rise to the doctrine of the existence of equitable easements? Is an equitable restriction an "easement created by deed" to the same extent as an express grant of a right of way?

Deed — Equitable Restriction — Building Line not Mentioned but shown on Plan incorporated by Reference for Description. — A made a plan of his land in building lots with several intersecting streets. The lots on all the streets showed a line fifteen feet from the street, and on both sides of all the streets running north and south, the words "Building Line" appeared, but no such words appeared on the lines shown running east and west. The first lot sold by A (now owned by defendant) was at the corner of Chestnut Avenue (running north and south) and Central Avenue (running east and west). The lot was described by number and bounded by the adjoining lots, for which reference was made to the plan and "This deed is conveyed subject to restrictions that no building shall be placed within fifteen feet of said Central Avenue." The defendant began to build fifteen feet back from Central Avenue, but close to the line of Chestnut Avenue, and the plaintiff, the owner of a nearby lot on Chestnut Avenue, sought to enjoin the building and enforce the set-back on Chestnut Avenue. *Held:* The plan showed a general scheme, and was so incorporated by reference in the deed without any inconsistent provisions that an equitable restriction was created by the building line on Chestnut Avenue, although that line was not mentioned in the deed of the corner lot. Injunction issued. (*Oliver* v. *Kalick*, 223 Mass., March 3.)

Deed — Intention to Deliver as a Present Conveyance. — Bill in equity to enjoin recording of deeds and to have them declared void and delivered up. A had two sons, the plaintiff, and B, an epileptic, who lived with his father and stepmother. A, the father, having a life estate in land with remainder to plaintiff and B, wished to provide for B, who also wished to provide for his stepmother in consideration of her past and future care of him. Accordingly, A drew deeds of B's interest in the land to the stepmother (the defendant) which were signed by B and handed by him to her and handed back by her to B during the same conversation. The deeds were not recorded and were kept in B's box until his death and he collected one-half the rents after his father's death. After B's death his stepmother took the deeds and claimed his share of the land. Decree for plaintiff. On appeal, *Held:* The finding that there was an unsuccessful attempt to make a testamentary disposition and not a delivery for present conveyance was not "plainly wrong." Decree affirmed. (*Tewkesbury* v. *Tewkesbury*, 222 Mass. 595.)

Easement of Light and Air. — Bill to enjoin erection of a one-story building. In 1825 the defendant's predecessor, owning both lots, conveyed one to the plaintiff's predecessor by deed granting "also the privilege of putting two or three windows in the north side of each dwelling-house which may be built on said premises, provided the same be blinded with reversed blinds." The present building on plaintiff's lot is a brick dwelling-house,

built about 1835, with three windows in the north side, overlooking defendant's lot, all above the first story. The defendant did not intend to block these existing windows. *Held:* 1st, An easement of light and air was created. 2d, As to the plaintiff's lot (originally about 20 ft. by 29 ft.), the words "each dwelling-house which may be built on said premises" mean each successive dwelling-house which may be built and not the total number which may be built. 3d, By application of the principle of specific location of an indefinite way by long user, "the rights of the parties have become settled . . . so far as the present dwelling-house is concerned, and . . . the owner cannot change the location of any of the windows, but his right . . . must be limited to the windows as they now exist." This is not a question of abandonment by non-user of an easement by express grant. "It is not necessary at this time to determine whether in case of . . . the erection of a new dwelling-house, windows . . . must be in the same location as in the present building." (*Kesseler* v. *Bowditch*, 223 Mass., March 3.)

Eminent Domain — Water Supply — Extent of Taking Damages — Evidence. — Nagog Pond was a natural great pond. In 1834 a dam was erected, so that five acres of the bordering farm of the plaintiff had been flooded ever since. In 1909 the town of Concord took for water supply "all the waters" of the pond and "the land under said Nagog Pond up to the overflow level of the existing dam . . . and all rights of flowage." Petitioner claimed damages for taking his five flooded acres, and requested the Court to rule that the town took the right to the exclusive possession of them. The Court refused, and left to the jury the question, "Did the petitioner . . . after the taking . . . retain all his private common law rights in the waters . . . as now flowed, so far as . . . not inconsistent with the use and purpose defined in the statute?" The petitioner excepted. *Held:* 1st, The meaning and effect of the taking, so far as it affects private rights of property, is a question of law to be decided by the Court and not a fact for the jury. 2d, Although the statute did not expressly authorize the taking of the fee, and the fee may not be required for a water supply, yet the purpose of the taking fixes the extent of the permissible use, and as one purpose was to preserve the purity of the water, this involves the right to exclusive use of the surface of the ground, whether this right is exercised at once or not. The whole beneficial use of the land in effect is taken, and damages must be assessed for it now. 3d, The petitioner was also deprived of all private rights in the waters because he was excluded. Such rights were only those resulting from his ownership of the flooded acres, and because of the flowage. He had no right to the maintenance of the dam; it might have been taken down, "but its existence was a circumstance to be considered in estimating his damage." He had no title to the waters; it was only a "usufructuary right," but such as it was he was deprived of it." 4th, Evidence of the height of the water since the taking was immaterial. Exceptions sustained. (*Flagg* v. *Concord*, 222 Mass. 569.)

Equity Practice. — *Held:* 1st, R.L., c. 159, § 23, relating to a report by "the justice by whom the decree was made" of "the material facts found by him" are not applicable where the case was heard only on exceptions to a master's report and no facts were found by the judge. 2d, Motions to vacate and recommit the case to the master cannot be considered after final decree. 3d, Reference to a master without objection by defendant operated as a waiver of a demurrer. (*Fairbanks* v. *Newhall*, 222 Mass. 598.)

EXECUTION — REDEMPTION FROM SALE — ALLOWANCE FOR CARE, ETC.— INTEREST — COSTS.— Bill to redeem land from executor's sale. Decree for plaintiff allowing the defendant reasonable compensation for care and collection of rents, interest from date of the levy, and costs to the defendant. Plaintiff appealed. *Held:* 1st, Although the statute does not expressly authorize a charge for collection, etc., yet it is fairly incidental to the authority given as the statute charges the creditor or purchaser with "rents and profits received or which might have been received." 2d, As to interest and costs the statute is clear. Decree affirmed. (*O'Brien* v. *McGeough*, 222 Mass. 303.)

EXPRESSMAN — HARP DAMAGED IN TRANSIT. — *Held:* "Even if the defendant was merely an expressman delivering packages in a certain district and was not a common carrier . . . which we do not decide" the evidence warranted a finding of negligence of defendant in performing his contract. Judgment of Appellate Division of the Municipal Court affirmed. (*Astrella* v. *Laffey*, 222 Mass. 469.)

HARBOR REGULATIONS — VALIDITY. — Complaint against the master of a tow-boat for allowing a schooner which he had in tow to anchor in violation of statute in a place not provided for by regulations of the Boston Harbor Master. A regulation provided that a specified area (A) in a larger defined area for anchorage in the upper harbor should be "reserved for steamers exclusively." The defendant allowed the schooner to anchor within this reserved area (A) and contended that the regulation was invalid because unreasonable. *Held:* That as the true construction of this regulation required steamers as well as their anchors to be at all times within area (A) and other vessels as well as their anchors at all times to be outside of it, when at anchor, the regulation was reasonable and valid as the different classes of vessels will swing differently in case the wind and tide set in opposite directions, and thus will cause danger of collision unless anchored in separate areas. (*Com.* v. *Perkins*, 223 Mass. 84.)

INSURANCE, BENEFICIARY — PRACTICE — INTERPLEADER. — Contract by heirs of husband for amount of certificate, payable to wife, who died before her husband, and no other beneficiary was designated. A stepdaughter, who had paid the assessments under an oral promise of the husband that she should have the proceeds, appeared as claimant. Case reported by the Superior Court after alternative rulings. *Held:* Under the by-laws, etc., of the defendant association, incorporated in the certificate, the plaintiff heirs were entitled to the fund. "But if the plaintiff's request that as matter of law they were entitled to a verdict should have been given, the case is before us on the report of the presiding judge under which justice may be done between the parties. The fund has been paid into Court by the defendant, and the plaintiffs and the claimant should be treated as interpleading under R.L., c. 173, § 37. It is evident that but for the payments which the claimant made, the certificate would have lapsed, and the plaintiffs would not have received anything. The advancements were made on the express promise of the decedent under whom they claim, and having been beneficial in the preservation should be reimbursed for both principal and interest. . . . By the terms of the report the plaintiffs are to have judgment in the sum of $1,246.89, with costs to the defendant taxed at $7.83, while judgment is to be entered for the claimant in the sum of $745.28." (*O'Brien* v. *Grand Lodge A. O. United Workmen*, 223 Mass.)

Insurance, Life — Bill to Reform Policy — Mistake — Evidence — Amendment. — A 30-year endowment policy was issued by defendant in 1886, in accordance with plaintiff's application, payable to his wife, her executors, etc. The plaintiff survived his wife and sued to reform the policy on the ground of mistake in the application alleging that the intention of both parties was that it should be payable to his wife only if she survived him within the 30 years. On appeal from decree dismissing the bill. *Held:* 1st, "The fact of a mutual mistake was not made clear by such 'strong and satisfactory proof' as is required in equity, as the ground for reforming a written contract." 2d, Evidence "that the form of application used for this policy had given rise to mistakes in other instances and therefore had been changed" was rightly excluded. 3d, "The plaintiff has asked . . . for relief by declaring the policy void on the ground that there never was a meeting of minds as to the terms of insurance and hence no contract at all, and that he ought to recover the money . . . paid as paid without consideration. That is not the frame of the present bill. The facts have not been ascertained on that issue. The defendant never has been heard on it. This does not appear to be a case for the exercise of the authority conferred by St. 1913, c. 716, § 3." The plaintiff may ask leave to amend before a single justice. (*Hayes* v. *Penn Mut. Life Ins. Co.*, 222 Mass. 382.)

Insurance — Fraternal Beneficiary Association — Waiver of Conditions. — Plaintiff's husband became certificate holder in the defendant association in 1900. The by-laws provided that "Upon the death of a member, each surviving member shall if necessary be assessed and shall within thirty days, thereafter, having been duly notified, pay . . . one dollar" and "failing to pay shall forfeit . . . membership and all interests . . . in the association, or any benefit . . . therefrom; but any member having thus forfeited . . . upon . . . application and . . . payment of all sums due . . . together with . . . fifty cents, may be reinstated by the officers . . . at any . . . meeting; provided . . . such application be made within thirty days after the expiration of the time of payment and is accompanied by a satisfactory certificate of . . . health, otherwise it must be treated as a new application." All dues and assessments were paid to Dec. 1, 1912, and in at least 58 instances during 11 years, the defendant without remonstrance accepted payment after the time limit stated in the notice. A postal card notice of an assessment of $1.50 was received by the plaintiff's husband Dec. 3, 1912, and another for $1.00 early in January, 1913. At 8.50 A.M., Jan. 7, 1913, the plaintiff mailed the two postals and the cash in Boston by registered mail to the defendant in Marlborough. On this day plaintiff's husband was in good health. He died the next day, January 8, at 11.15 A.M. It did not appear when the registered letter was received, but defendant refused to accept the money in it. Case reported on agreement of parties that if there was any evidence for a jury judgment should be entered for the plaintiff for the amound of the benefit ($1,000). *Held:* 1st, It was for the jury whether the registered letter was received before the death. "We do not deem it necessary to determine whether under the circumstances, the sending of the amount . . . could be found to be a payment . . . even if . . . never received. . . ." 2d, "It could not be ruled as matter of law that the by-law was not waived . . . and that therefore the rights of the holder of the certificate . . . had been forfeited . . .

it was a question for . . . the jury." The burden of proving forfeiture was on the defendant. Judgment for plaintiff. (*Crowley* v. *A. O. H. Widows' and Orphans' Fund*, 222 Mass. 228.)

Insurance, Life — Construction of Re-insurance Contract — Blanket Vote of Policy-holders ratifying all Acts of Directors — Excess Premiums paid "under Protest." — Bill for specific performance of re-insurance contract. Association A issued a policy of $2,000 on the plaintiff's life on the assessment plan, premiums to be paid semi-annually according to a "Table of Rates" on the back of the policy. Later the Association's name was changed to Company B and then the business was taken over by the defendant company which issued to the plaintiff a reinsurance policy "on the plan of yearly renewable term insurance" which provided "it is hereby agreed that in no event shall the assured of said (Company B) be required to pay (the defendant company) under this contract . . . any amount exceeding the rates contained in the table upon the back of said policy." The table on the back of the original policy established rates between the ages of 25 and 55. The plaintiff was 47 when he took the original policy and he having paid the tabulated rates up to 1905, when he became 55, the defendant then increased his rates according to a new table for persons older than 55. Plaintiff paid the increased rates until 1914 "under protest" claiming that the 55-year rate in the original table was all that he was bound to pay. The defendant said that the original table was printed merely to illustrate the principle of insurance on the assessment plan and was not a complete schedule of rates fixing premiums beyond 55 years. The bill was brought to determine the maximum premiums and to recover back excess payments. *Held:* 1st, The original table fixed the maximum rate for the plaintiff after he reached 55. 2d, "While the premiums were increased . . . by vote of the directors of the defendant company, and afterwards, at a meeting of the policy-holders, a vote was passed 'adopting, ratifying, and confirming' all acts of the directors at the meeting at which their vote was passed," yet as the master found that there was no evidence that this vote of the directors was called to the attention of the policy-holders the plaintiff cannot be held to have ratified the increase in rates and his policy rights are not affected. 3d, Under the principle that "unless otherwise provided by statute" voluntary payments where no obligation exists cannot be recovered back, the protest of the plaintiff was immaterial, and he canot recover the excess payments. (*Rosenfeld* v. *Boston Mut. Life Ins. Co.*, 222 Mass. 284.)

Joint Tenancy of Savings Bank Deposit — Novation. — Bill in equity by A's administrator for savings bank deposits. A put his money in two banks. Later he went to one bank with his sister, Mrs. Worthington, and at his request the words "Payable also to Abbie Worthington" and "Either party or the survivor of them may draw the whole or any part now or hereafter deposited on this account with interest" were added to his books. Mrs. W. then signed the by-laws and identification card. They put the books in a tin box, and then went to the other bank and the words "may be drawn by his sister Abbie Worthington" were added to his books in that bank, and she signed the by-laws and card. One of the officers of the second bank prepared a label "Property of Abbie Worthington" and by A's direction pasted it on the tin box in which all the books were put and the box locked and left

at the bank, each having a key. *Held:* This was not a case of an attempt to make a testamentary or other gift of the deposits as property; there was a complete novation as to both banks, and under the new contracts of deposit the sister was entitled to the deposits as survivor in joint tenancy. (*Chippendale, Admr.*, v. *North Adams Savings Bank*, 222 Mass. 499.)

JUDGMENT — EXECUTION PARTIALLY SATISFIED BY INEFFECTUAL LEVY — CONCURRENT REMEDIES. — *Held:* *Scire facias* and a new action for the balance of a judgment are concurrent remedies under R.L. 178, § 51, where an execution is returned satisfied in part by ineffectual levy on real estate standing in the name of a person other than the judgment debtor, and it is only when the execution has been returned fully satisfied by such an effectual levy that *scire facias* is the exclusive remedy. (*Habib* v. *Evans*, 222 Mass. 480.)

LANDLORD AND TENANT — DRAIN PIPES. — Tort by tenant against landlord for damage to goods caused by overflow in floor above from pipe not used or controlled by plaintiff and resulting from negligence of landlord. *Held:* Verdict for plaintiff warranted by the evidence. (*Hilden* v. *Taylor*, 222 Mass., March 3.)

LANDLORD AND TENANT — NEGLIGENCE OF LANDLORD. — The sewer pipes froze. There was evidence that the plaintiff tenant told the defendant landlord that unless they were thawed out he would move next day. The landlord and another man tried to thaw them out with lighted kerosene rags and set the house afire, thus damaging plaintiff's goods. *Held:* Evidence warranted finding that the landlord's undertaking was not gratuitous, and that he was negligent and therefore liable. (*Franco* v. *Maker*, 223 Mass. 71.)

LANDLORD AND TENANT — REPAIRS. — Tort for personal injuries to plaintiff, a nurse, from the breaking of a step in defendant's house, leased to A, who employed the plaintiff. *Held:* Plaintiff has mistaken her remedy. There was no agreement by defendant to repair; no oral conversations with an alleged agent of defendant were admissible to vary the lease subsequently executed; and mere want of repair without reasonable notice to the landlord would not be evidence of negligence. (*Mills* v. *Swanton*, 222 Mass. 557.)

LANDLORD AND TENANT — TENANT INJURED BY FALL OF DUMB-WAITER. — *Held:* No evidence appeared to warrant verdict for plaintiff. Exceptions sustained. Judgment for defendant under St. 1909, c. 236. (*Green* v. *Hammond*, 223 Mass.)

LAYING OUT OF WAY — REIMBURSEMENT OF LANDOWNER FOR EXPENSES OF OPPOSING LAYOUT NOT ALLOWED. — Petition under R.L., c. 48, § 13, for indemnity for expense of witnesses, surveyors, counsel fees and loss of time in opposing layout before county commissioners and after layout in successfully obtaining a writ of certiorari to quash the proceedings. *Held:* Considering the purpose of the original act (1842, c. 86, § 1) it did not include a right to indemnity for expenses in *opposing* a layout, and there is nothing in the subsequent history of the verbal changes in the statute to indicate any change in the legislative intention on this point. Petition dismissed. (*Main* v. *County of Plymouth*, 223 Mass. 66.)

LEASE — AGREEMENT FOR INCREASED RENT ON INCREASED TAX VALUATION — EXISTING INCREASE UNKNOWN TO PARTIES. — In a lease beginning June 1, 1913, lessee covenanted to pay a specified rent for 12 years, and in

any year when the tax assessment should exceed the "present valuation thereof, namely, $98,000," to pay an additional six per cent of the excess. Unknown to either party the assessors had raised the assessment beginning April 1, 1913, to $125,000. Lessor sued for the additional six per cent from June 1, 1913. *Held:* Construing the covenant as a whole the words "present valuation" "$98,000," were not repugnant, but the figures explained the words and the plaintiff was entitled to the six per cent on the excess of the actual valuation over $98,000. (*Winsor* v. *Ulin*, 223 Mass.)

MORTGAGE — FORECLOSURE — BILL TO RESTRAIN ACTION FOR DEFICIENCY. — *Held:* As plaintiff showed no invalidity or bad faith in foreclosure sale, decree dismissing bill affirmed. (*Taylor* v. *Weingartner*, 223 Mass., March 3.)

MORTGAGE FORECLOSURE — DISTRIBUTION OF PROCEEDS. — On appeal from a decree sustaining demurrers to a bill by the receiver of the Lenox Hotel Company for a share of the proceeds of foreclosure of the first mortgage, based on a theory of a subrogated right to follow funds involved in certain complicated payments made during the unfortunate history of the equity in the property. *Held:* "The payments clearly appear . . . to have been made for the specific purpose of preventing the foreclosure of either mortgage, and, if possible, saving the property for . . . whoever for the time being was the owner of the equity; the payments having been made and accepted in partial satisfaction of a valid outstanding incumbrance which could be discharged only by full compliance with the conditions of the mortgage, under the agreement of payment the debt in so far as extinguished cannot be revived to deplete securities which are wholly insufficient to discharge the primary obligation." (*Williams, Rec'r*, v. *Old Colony Tr. Co.*, 222 Mass. 378.)

MANDAMUS — APPOINTMENT TO PUBLIC OFFICE. — Petition to compel recognition of petitioner as member of Licensing Board of the City of Lawrence. The late mayor, when about to undergo an operation, wrote in pencil a "temporary" appointment of A to the vacancy which was found to be "testamentary and revocable, to take effect only on the mayor's death." This was left with B, but no one else was notified. The mayor survived the operation and then told B to rub out A's name and substitute C's name, and to notify C but no one else, and that he would make the appointment public August 17. B filled in C's name and notified C. On August 16 the mayor died. On August 17 B delivered the appointment to C. On August 18 C took an oath of office, and on September 8 attended a board meeting and was recognized by the board as a member of record. Later the new mayor undertook to appoint D and the petitioner was thereafter excluded from the exercise of his functions. The single justice ordered a peremptory writ to issue. On exceptions, *Held:* 1st, There never was an appointment of A. 2d, Under R.L., c. 100, § 4, providing that members of licensing boards shall hold office until their successors are "appointed and qualified," no oath is required in order to qualify and the petitioner qualified by his participation in the meeting of September 8. Whether all the acts mentioned were necessary to complete his qualification "it is not necessary to decide." Exceptions overruled. (*Brogan* v. *Mayor of Lawrence*, 223 Mass. 196.)

NEGOTIABLE INSTRUMENTS — HOLDER IN DUE COURSE — "IMMEDIATE PARTIES." — A being indebted to the defendant B paid him with two checks, payable to B and signed as maker by the plaintiff company by C, treasurer. B collected the checks in the usual course of business and the plaintiff company then sued B to recover the amount on the ground that its treasurer, C, had not authority to sign and deliver the checks. *Held:* The defendant B, having no business relations with the plaintiff company, and receiving the checks from A, as completed instruments without notice of infirmity were holders for value in due course and were not "immediate parties" under R.L., c. 73, § 33, making such parties to a negotiable instrument chargeable with notice of conditions and limitations to it. Judgment for plaintiff reversed and entered for defendant. (*Nat'l Investment and Security Co.* v. *Corey*, 222 Mass. 453.)

NUISANCE — SHAKY HOUSE ON SHAKY GROUND SHAKEN BY MACHINERY. — Plaintiffs lived in an old house (which shook when some one walked across the floor), in a neighborhood built on the edge of an old bog, and were shaken when the modern machinery of the defendant's factory was reasonably operated. *Held:* The master's finding that there was no nuisance was warranted. Bill for abatement dismissed. (*Cremidas* v. *Fenton*, 223 Mass.)

PARTNERSHIP. — Bill in equity to dissolve partnership, and for an accounting. *Held:* Evidence showed a partnership at will on the understanding that a lease could be obtained of a certain building. The defendant obtained the lease for a fixed term for "the benefit of the partnership," and although he took it in his own name, he must account for its value on the dissolution to which the plaintiff is entitled. (*Deutschman* v. *Dwyer et al.*, 223 Mass., March 3.)

PERSONAL INJURY — ACTION FOR DEATH — DUE CARE. — Tort against a gas company for causing death, brought by administrator of A, who moved into a tenement on April 1, thinking there was no gas in the pipes. He was last seen alive about 9 A.M., April 5, and about 2 P.M. of that day he was found, dead from gas, sitting in a chair with a chandelier in his hands, which had been unscrewed from above, and a rag and cleaning material on a table beside him. His wife was also dead from gas on the bed in the next room. All the windows and doors in the place were closed. Verdict for plaintiff. On exceptions, *Held:* "Assuming" negligence in the defendant under peculiar circumstances which misled the deceased to suppose there was no gas in the pipes, yet there was no evidence of due care of the deceased. What happened is "wholly a matter of conjecture." Judgment for defendant under St. 1909, c. 236. (*Ashton* v. *Fall River Gas Works Co.*, 223 Mass. 20.)

PERSONAL INJURY — ACTION FOR DEATH — EMPLOYEE WHILE DELIVERING CHRISTMAS PRESENT DURING LUNCH HOUR NOT "IN EMPLOYMENT OR SERVICE" — EVIDENCE. — Action by administrator to enforce statutory liability of the defendant for causing death of a person who was not in its "employment or service." The deceased was an employee of the defendant on the tenth floor of the defendant's building. On December 23 at her usual lunch hour she put on her street clothes and entered the elevator to go to the ninth floor to deliver a Christmas present to another employee. While getting out at the ninth floor the elevator was negligently started and she was fatally

hurt. Verdict for plaintiff. On exceptions, *Held:* 1st, A finding "that at the time of the accident" she "was not in the employment or service" of the defendant was warranted. 2d, No error was shown in admitting the question "In your opinion did the deceased speak loud enough when she said 'Let me off at the ninth floor, please' for the operator of the car to hear?" It did not call for a mere opinion, but for a method of indicating a set of "complex" or "collective" facts difficult to describe in detail like identity, size, time, distance, etc. (*Ross* v. *John Hancock Mut. Life Ins. Co.*, 222 Mass. 560.)

Personal Injuries — Defective Ladder. — *Held:* Evidence warranted finding of negligence. (*Levesque* v. *Charlton Mills*, 222 Mass. 305.)

Personal Injury — Negligence — Engineer Failing to Slow Down for Brakeman to Jump on after Turning Switch. — *Held:* Verdict of negligence warranted. (*Henshaw* v. *B. & M. R.R.*, 222 Mass. 559.)

Personal Injuries — Seven-year-old Child Struck by Middle of Car in Plain Sight — No Evidence of Negligence on Plaintiff's Story. — After verdicts for the child and his father, exceptions sustained and judgment entered for defendant under St. 1909, c. 236. (*Osborne, p. p. a.*, v. *Bay State Ry. Co.*, 222 Mass. 427.)

Personal Injury — Licensee Walking across Branch Freight Track without Looking. — Tort by administratrix for negligently causing death of intestate, who was killed by freight train. Verdict for plaintiff. *Held:* No evidence of due care, exceptions sustained and judgment for defendant under St. 1909, c. 236. (*Peterson* v. *N.Y., N.H. & H. R.R.*, 222 Mass. 471.)

Personal Injuries — Projecting "Shut-off" Box in Town Sidewalk — Evidence — Cross-examination. — Tort against a town for injuries caused by defect in way. *Held:* 1st, Evidence warranted a finding of a defect, and that the town was chargeable with notice of it. 2d, Questions as to facts not material to the main issue may be admissible on cross-examination, in the discretion of the presiding judge, for the purpose of explaining previous testimony or testing credibility, and where no harm appears to have resulted from such admission under the particular circumstances, there is no reversible error under St. 1913, c. 716, § 1. (*Thomas* v. *Winthrop*, 222 Mass. 456.)

Personal Injury — Explosion of Hot Water Boiler — Negligence of Plumber. — Tort against a plumber for negligent work, resulting in injuries from explosion. *Held:* Evidence warranted verdict for plaintiff. (*Kelly* v. *Laraway*, 223 Mass. 182.)

Personal Injury — Traveler on Path along Street Car Track. — *Held:* Verdict for plaintiff warranted. (*Brereton* v. *Milford, etc., Ry. Co.*, 223 Mass. 130.)

Personal Injuries — Traveler Stumbling Over Grade Stakes Placed by Town Officials Repairing Way. — *Held:* Evidence warranted verdict against the town for defect in the highway. (*McCarthy* v. *Stoneham*, 223 Mass. 173.)

PERSONAL INJURY — CIRCUMSTANTIAL EVIDENCE — INTERPRETATION OF BILL OF EXCEPTIONS. — Plaintiff was waiting on the platform at Brookline Village for a street car. There was an "explosion," "a flash and smoke," and something entered his eye, which when taken out proved to be a piece of lead. There was evidence that copper fuses were used on the particular type of car, and that a lead fuse *heavy enough to operate the car* could not be inserted in the fuse box. There was also evidence that lead fuses were used on some cars of the defendant, that the fuse box had not been inspected for six days, and "that the jaws of the clamp were sufficient to take in a lead fuse, and that a fuse easily could be inserted." Verdict for the plaintiff of $15,000. On exceptions, *Held:* "Only two possible causes of the injury were suggested; one that it was due to a bullet from a cartridge (on the rail or elsewhere), the other that it was caused by lead expelled from the fuse box. The first they might well consider as negatived by the evidence and probabilities. . . . And we cannot say as matter of law that in reasoning back from the effect to the existence of the cause, the jury could not logically and reasonably infer . . . that the lead . . . came from the fuse box. Necessarily the evidence as to where the lead came from was largely circumstantial. . . . But the conclusion which they reached was not based on mere conjectures; it was the result of logical reasoning from established facts." 2d, "The statement in the bill of exceptions, that it 'comprises a statement of facts not in dispute, and all of the evidence and proceedings material to the questions of law raised' does not limit the plaintiff's right to the full probative effect of the evidence in his favor, nor preclude him from arguing that the jury were free to discredit it, or discount that offered by the defendant." Exceptions overruled. (*Davis* v. *Boston El. Ry. Co.*, 222 Mass. 475.)

PERSONAL INJURY — EXPERIENCED RAILROAD BRAKEMAN INJURED AT NIGHT ON PREMISES OF COAL COMPANY — NEGLIGENCE — RELIANCE ON GRATUITOUS CUSTOM. — Two actions by the same plaintiff, one against a railroad and one against a coal company. The plaintiff, an experienced brakeman, had been at work for a month or more moving cars of the railroad at night in the coal company's yard. While holding the grab handle and standing on the step of the forward end of a moving freight car he was caught by a post between tracks 3 feet 5/8 inches from the track on which his car was. The coal company erected and controlled the post. The coal company had voluntarily assumed the lighting of the yard and there was evidence that it was not as well lighted as usual on the night of the accident. Verdict ordered for the defendant in each case. On exceptions, *Held:* 1st, There was no evidence of the railroad's negligence. It was not bound to point out to an experienced brakeman obvious structures on the coal company's land. 2d, The coal company was not bound to inform itself when each railroad employee began work on its land and point out obvious structures; but having voluntarily assumed the duty of lighting the yard, and there being evidence that the light nearest the post was out, the jury might find that the purpose of this practice of lighting was to assist the trainman and if "the plaintiff relied on the practice and because of its failure . . . he was injured, by failing to see the post, the jury might find the coal company . . . negligent." Exceptions overruled as to the railroad and sustained as to the coal company. (*Cross* v. *B. & M. R.R.*, 223 Mass. 144.)

Personal Injury — Negligence — Assumption of Risk. — Actions by two plaintiffs against two street railway companies A and B. About 5 P.M. both plaintiffs mounted the left-hand running-board near the middle of an open car of Railway A. The seats were filled and there were passengers on both running-boards and there was evidence that for four or five years at that time of day in that part of the city passengers rode on both running-boards. As the car rounded a curve both plaintiffs were struck by a wide yellow box car alleged to belong to Railway B. A verdict was directed for both defendants. On exceptions, *Held:* 1st, "The left-hand running-board of an electric car in motion is a place of such obvious danger that under ordinary circumstances a passenger who voluntarily selects such a position . . . assumes all the risks" . . . but the carrier may "impliedly agree to carry" passengers there and if there is sufficient evidence of such understanding the jury must pass on the care of the plaintiff and negligence of the defendant. "It was within the power of the defendant to prevent the . . . riding on the running-board." In this case "this practice had become so notorious and had continued for so long . . . at the hour of the day and at the place in question, considering all the circumstances, that in the opinion of the majority of the Court, the plaintiffs did not assume the risk of the defendant's negligence. The majority of the Court think there was sufficient evidence of the plaintiff's care for the jury. 2d, The motorman of Railway A must have known that passengers were on the left-hand running-board, that he was approaching a curve and a car of unusual width. "We cannot say, as matter of law, that this defendant was not negligent." 3d, No cars were run on this track except those of Railways A and B. There was evidence that none of A's cars were box cars and B's cars were yellow box cars. As the men on the running-board could be seen by the motorman of the box car and he knew the swing of the car the question of negligence of Railway B was for the jury. Exceptions sustained. (*Walsh* v. *Boston El. Ry.*; *Same* v. *Bay State St. Ry.*, 222 Mass. 275.)

Personal Injury and Death — Proximate Cause. — Action for injuries by defendant's wagon and verdict for plaintiff. Then plaintiff died and his administrator sued for his death as caused by the accident which aggravated a diseased condition of the bladder and hastened death. *Held:* There was evidence for the jury in both cases. (*Walker* v. *Gage*, 223 Mass. 179.)

Personal Injury — Tailor Visiting Ship to Take Orders with Pass Conditioned to Free Company from Liability. — Plaintiff, a tailor, having a pass and having for years done business for crews and officers of defendant company, went aboard a ship at the request of the wireless operator in regard to a uniform which he had ordered. On the way to the operator's room his leg was broken by a large bundle of canvas dropped from an upper deck. *Held:* 1st, The plaintiff, permitted to do business on defendant's ship solely for his own pecuniary gain, was a mere licensee to whom the defendant owed no duty except to refrain from wantonly and wilfully causing him harm. 2d, The evidence warranted a finding of wanton and reckless conduct by deliberately throwing the canvas from the upper deck without the slightest consideration for the safety of any one who might be below. 3d, But under the broad condition of the pass exempting the defendant from liability of all kinds it was error not to instruct the jury that if

plaintiff was on the ship by reason of the pass he could not recover. There was nothing illegal in the condition of the pass. Exceptions sustained. (*Freeman* v. *United Fruit Co.*, 223 Mass.)

Personal Injury — Common Enterprise — District Nurse and Doctor. — A district nurse was being driven to a patient by a doctor in his car, which skidded and threw her out. *Held:* 1st, The evidence warranted a verdict of negligence. 2d, As to the defence of imputed contributory negligence resulting from a common enterprise, "We do not find it necessary to consider whether it could have been found the plaintiff and defendant were engaged in a common enterprise nor whether if they were the defendant's contention that neither one could sue the other is well founded."

It could not have been ruled as matter of law that the parties were engaged in a common enterprise. The plaintiff was hired and paid by the Women's Club of Winchendon to attend patients who "could not afford a nurse," when called upon to do so by the doctor in charge of such a patient. She testified that it was a "common thing for the different doctors to take you to their cases when they were making their calls" when the patient was so far out of town as in this case. The defendant testified that: "It was her (the plaintiff's) duty to go with me on my request." This warranted a finding that transportation was an implied term of the plaintiff's contract of employment, that the plaintiff was bound to accept the doctor's automobile as the method of transportation when offered and that the plaintiff was being carried under her contract, *i.e.*, by the defendant for hire. Judgment for plaintiff. (*Loftus* v. *Pelletier*, 223 Mass. 63.)

Personal Injury — Passenger Tripping over Cleats on Threshold of a New Car. — The cleats in common use were one-fourth inch above the surface for guiding the door and plainly visible. *Held:* No evidence of negligence. (*Perkins* v. *Bay State Ry. Co.*, 223 Mass.)

Personal Injury — Survival of Action for Causing Death. — Action was brought by an administrator under statute for the benefit of the next of kin for negligently causing death of the deceased, a single man, whose father was his only next of kin. After the action was brought and before tried the father died and the defendant claimed that his death barred recovery. *Held:* 1st, The right vested in the father as next of kin at the death of the father and was not defeated by the father's death.

"The legislature, in providing an additional remedy in cases of death resulting from negligent conduct in Sts. 1881, c. 199, § 1; 1886, c. 140, retained, in the use of the words "damages . . . to be assessed with reference to the degree of culpability," the distinguishing feature of a fine imposed by Court after a conviction upon an indictment. In the emphasis given to the consideration of the wrongful and blameworthy conduct of the defendant there appears a dominating purpose to induce carriers and others to exercise a higher degree of care toward passengers, the traveling public, and others, than they might exercise otherwise. Compensation is a secondary consideration and results only from the provision common to indictment and action that the fine or damage shall be paid to or recovered by the executor or administrator of the deceased to the use of certain designated persons. . . . If the death of the beneficiary discharges the liability of the wrongdoer the principal object of the legislature is defeated.

The difficulty of determining the pecuniary injury to a beneficiary who

shall die before judgment is not present in the administration of our act, as it may be either an extension of common law rights or purely compensatory; and the decisions of courts in construing compensatory legislation modelled upon the so-called 'Lord Campbell's act,' St. 9 and 10 Vict., c. 93, are of little weight in the consideration of the question presented in the case at bar.

We are of opinion that the right to recover the fine when imposed by the Court, or the damage as determined by a jury, vested by legislative provision in the named beneficiary living at the death of the person injured, and that the pending action was not abated nor the cause of action discharged upon his death. . . ." 3d, The evidence warranted a verdict of due care of the deceased and negligence of the defendant. (*Johnston* v. *Bay State St. Ry.*, 222 Mass. 583; cf. Note *Harv. Law Rev.*, May, 1916, p. 781.)

PERSONAL INJURY — RAILROAD — NO IMPLIED CONTRACT FROM MERE ACQUIESCENCE IN USE OF DANGEROUS APPROACH — DUE CARE. — Tort by administrator for death. A safe approach to the station was provided. The deceased, instead of using this, took a common short-cut to the last car on the train by crossing a vacant lot and walking on top of a retaining wall and thence up to the level of the tracks at a point separated from the station by two tracks and an open girder bridge. He waited beside the track, reading a paper, and was killed. *Held:* Verdict properly ordered for defendant. (*Youngerman* v. *N.Y., N.H. & H. R.R.*, 223 Mass. 29).

PERSONAL INJURY — DUE CARE. — Tort by administrator for death. The deceased, in crossing the street to reach a white post, stopping place of an approaching car in plain sight, stepped on the track when the car was only about ten feet away, and was killed. *Held:* Verdict properly directed for defendant. (*Welsh* v. *Concord St. Ry. Co.*, 223 Mass. 184.)

PLEADING — DEMURRER TO DECLARATION. — Action on fire insurance policy covering articles of personal property alleging that the defendant made a policy to A payable in case of loss to B and the plaintiff "as their interest may appear," that the plaintiff had an interest by mortgage from A, that the articles were destroyed by fire and the conditions of the policy complied with and that he is entitled to recover the value of the goods destroyed to the amount of $148.75. The declaration contained no statement of B's interest, of the total value of the goods or whether B's interest was prior or not; there was nothing to show that the defendant would not be subjected to another action by B, if required to answer in this. The Court below sustained a demurrer on the ground that the declaration did not set out with substantial certainty substantive facts necessary to constitute a cause of action, and ordered judgment for defendant. On appeal judgment affirmed. (*Fresbee* v. *Prussian Nat'l Ins. Co.*, 223 Mass. 159.)

PLEADING — ORAL EVIDENCE CONNECTING COLLATERAL WRITTEN CONTRACTS. — Contract by a real estate broker for a commission. Defendant signed two applications, one for a first mortgage of $30,000, and one for a 2d mortgage of $10,000, each providing for a commission. The plaintiff procured the first mortgage but not the second. Defendant offered to prove that he explained to the plaintiff that the procuring of the 2d mortgage was a condition precedent to commission on the first mortgage as there was no difficulty in getting a first mortgage; there being one already on the property this was excluded. *Held:* The evidence offered was admissible under a general denial to show that the agreement as to the first mortgage was not unconditional. Exceptions sustained. (*Bowes* v. *Christian*, 222 Mass. 359.)

PRACTICE — PERSONAL INJURY — SPLITTING CAUSE OF ACTION. — Two actions tried together, one for causing death and conscious suffering of plaintiff's intestate, and one for medical and other expenses. Verdict of $7,000 for death and $150 for suffering in 1st action and a verdict also for expenses in 2d action. On report of the 2d action, *Held:* Such expenses were part of the damages recoverable in the 1st action and cannot be made the subject of a separate action. Judgment for defendant in 2d action. (*Cole, Admr.*, v. *Bay State St. Ry. Co.*, 223 Mass.)

PRACTICE — COSTS. — In an action joining several counts for distinct causes of action the defendant prevailed on one count and the plaintiff on the others. Costs were taxed by the clerk for the plaintiff and on appeal by the defendant the presiding judge ruled that three items allowed to the plaintiff by the clerk "were specially applicable to the count on which the defendant prevailed and . . . should be disallowed." All the other items were not specially applicable to that count and were allowed. On further appeal the defendant contended that under R.L., c. 203, § 10, each party equally should be allowed the travel and attendance of witnesses necessary upon the count upon which he prevails, notwithstanding the fact that such witnesses are necessary also under the other counts. *Held:* The history of the statute is against this contention and its construction settled. Ruling of presiding judge affirmed. (*Jewett* v. *Boston El. Ry.*, 222 Mass. 581.)

PRACTICE — DECREE UNDER RESCRIPT. — *Held:* On appeal from a final decree after rescript the only question is whether the decree conforms to the rescript. Here no ground of complaint is shown. Decree affirmed. (*King* v. *Connors*, 233 Mass., March 3.)

PRACTICE — DIRECTION OF VERDICT AFTER VIEW AND ANSWERS TO SPECIAL QUESTIONS — ST. 1913, c. 716, § 2. — Tort for personal injury to plaintiff, the defendant's farm hand, who helped to load a cart with wood on a rough and sloping lot and then mounted the load and tipped over with the cart. The jury viewed the cart. The Court prepared seven questions to which the plaintiff did not object. The plaintiff then asked for a general verdict also, but the Court refused and the plaintiff did not except to the refusal. The jury answered the questions that no careless act of the plaintiff or of defendant's foreman contributed; that the king-pin was a proper one; that "the condition in respect to the king-pin" was "defective or dangerous;" that this condition was not obvious to the plaintiff. Question 6, "Was the condition of the wagon in respect to the king-pin a cause of the accident?" The jury answered "No." Question 7, "If the jury answer 'Yes' to question 6," then "in what way the king-pin was the cause of the accident . . . ?" "If your answer to No. 6 was 'No' you have no occasion to answer No. 7." The jury returned no answer to 7. The Court then directed a verdict for the defendant and the plaintiff excepted. *Held:* 1st, The question is not, to what extent the impressions from the view were evidence, but whether it appeared by the record that the excepting party was prejudiced by action of the Court. 2d, It did not appear that there was anything about the wagon in the testimony, or called to the attention of the jury during the view, which entitled the plaintiff to go to the jury on anything not covered by the questions. "It has long been settled in this Commonwealth that the trial judge . . . may direct a verdict notwithstanding . . . a view." Exceptions overruled. (*Albright* v. *Sherer*, 223 Mass. 39.)

PRACTICE — INTERPLEADER — LACHES — NATURE OF STATUTORY RIGHT. — Contract for services. Defendant pleaded a general denial, payment, and further that if he contracted it was with the plaintiff as agent of the B company. After trial and verdict for plaintiff, defendant moved to join the B company as a party. *Held:* 1st, It was too late. 2d, "In the case at bar the defendant's difficulty is even more fundamental than that of laches. Interpleader lies only when the party is exposed to several actions for the same demand, while he is in favor of the claimant who establishes his right thereto, and he himself claims no personal interest in the subject matter of the litigation. Between the claimants he should stand indifferent. If he denies and contests the right of one of them to share in the money due, or if he has incurred a personal liability to either of them, independent of the question between the claimants themselves, he is not entitled to relief by way of interpleader. Its office is to protect a party, not against a double liability, but against a double vexation on account of one liability." (*Gonia* v. *O'Brion*, 223 Mass. 177.)

PROBATE APPEAL — LATE ENTRY. — On appeal from order of a single justice dismissing petition for leave for late entry of probate appeal under R.L. 162, § 13. *Held:* No excuse was shown for failure to enter in time. Order affirmed. (*Linehan* v. *Linehan*, 223 Mass.)

PUBLIC HIGHWAY — DEFECT — ELECTRIC WIRES WITHIN REACH. — Tort by an administrator against a town for death. A telephone pole on the edge of the sidewalk carried also electric light, etc., wires of the defendant town's plant, and the pole was supported by a guy wire attached to the pole six feet, eight or nine inches, above the ground, and thence running upward to another pole. The deceased, a traveler, leaned against the pole, and then, as if "yawning," lifted his arm, touched the guy wire, received a shock, and died on the spot. Exactly how this guy wire became charged did not appear. *Held:* Without deciding that the evidence warranted a finding of negligence of the town as to its electricity, the guy wire "conditioned as this wire was" did not constitute "in itself a defect in the way." Judgment for the town. (*O'Donnell* v. *North Attleborough*, 222 Mass. 591.)

PUBLIC SCHOOL TEACHER'S SALARY. — A public school teacher, under a contract at a fixed salary, paid in monthly installments, died in the summer vacation leaving one month of the year, and her executrix sued for that month's installment. *Held:* There was an implied condition that she should be living and physically able to do the work, and accordingly the contract was terminated by her death; the contract being entire though payments were by installments and further payments being conditioned on continuance of the contract and not upon whether she was excused. Judgment entered for defendant. (*Donlan, Extx.*, v. *Boston*, 223 Mass.)

RELIGIOUS SOCIETY — EXCLUSION FROM COMMUNION — JURISDICTION OF CIVIL COURTS — DEFAMATION. — A minister of the Episcopal Church, without comment, refused to administer the Communion to the plaintiff. By the canons of the Church, a minister is given authority to refuse the rite to those whom he "deems open, notorious, evil livers, or to have done any wrong to his neighbors by word or deed." A person thus excluded is given an appeal to the bishop. The plaintiff did not pursue this appeal, but brought an action against the minister to recover damages for the exclusion, and for

slander. *Held:* That she cannot recover. (*Carter* v. *Papineau*, 222 Mass. 464; see Note, *Harv. Law Rev.*, March, 1916, p. 560.)

Replevin — Automobile — Storage Lien. — *Held:* As the right to replevy depends on the right to immediate possession a lien for storage of a car under c. 300 of 1913, for a part of the period of storage is sufficient to defeat the plaintiff's writ unless the lien is recognized or avoided. (*Doody* v. *Collins*, 223 Mass., March 6.)

Spendthrift — Restraint on Alienation of Principal. — The testator left property in trust to pay the income to his son for life, then to his children or their issue, until the youngest child reached, or would have reached, forty years, when the principal was to be divided equally among the then surviving children or issue. The testator further provided that, "It is my will that every payment of income or principal hereinbefore directed or devised to be made, shall be made personally to the persons to whom they are devised or upon their order or receipt in writing, in either case free from the interference or control of the creditors of such persons and never by way of anticipation or assignment." The son having died and the time for distribution of principal arrived, one of the children over forty years old, had been adjudged a bankrupt before distribution, and his trustee in bankruptcy claimed his share of the principal on the ground that the rule of *Broadway Bank* v. *Adams*, did not extend to an equitable fee or principal of a fund. *Held:* The case is within the doctrine of *Broadway Bank* v. *Adams*, which "there is every reason to believe has been accepted and acted upon by the bar, settlors, and testators for thirty-three years . . . a trust of the nature under discussion has been repeatedly recognized and conformed to until the legal principle involved has become a safe and well-established rule affecting the practical administration of justice." The bankrupt is entitled to the share. (*Boston Safe Deposit Co.* v. *Collier*, 222 Mass. 390; see Note, *Harv. Law Rev.*, March, 1916, p. 557.)

Spendthrift Trust — Responsible Nature of Trustee's Discretion. — A, having accumulated $2,000 from savings and wishing to provide for B, an industrious young woman who had lived with her for 20 years, created a trust in 1908 "To pay over to (B) . . . when in the judgment of said (trustee) the said (B) is deserving and in need of aid, whatever part of said . . . $2,000, or its earnings that said (trustee) may deem for the best interests of said (B) in such sums and at such times as he may deem expedient or necessary, but said sum . . . or any part thereof or its earnings shall not be subject to the control or interference of the creditors of said (B) nor alienable by her save that she shall have the right to dispose at her death by any testamentary document of whatever part of said . . . $2,000, and its earnings as may be left at the time of her death." There followed provisions for distribution of the fund after B's death.

Three years later B became engaged and the honest trustee who knew her and thought highly of the man she was to marry, without being asked to do so by her, gave it all to her because "I thought she was conducting herself like a good girl and I could give it to her. . . . She could take better care of it than I could, and it was not bringing any interest in . . . that if she put it in a savings bank she could get more interest; and I was intending to go to Ireland, and I did not know what might happen, and I thought it

was in safe hands to give it to herself. . . . I thought I gave it to the sole owner."

The plaintiffs interested in remainder filed a bill in equity to procure the repayment of the fund to the trustee. *Held:* Although the trustee acted under an honest mistake as to his duties and A's rights under the trust yet the payment of the entire fund under the circumstances was a "perversion of the trust."

"Doubtless a trust might be created which . . . would make the judgment of the trustee, however unwise . . . the final test." But this instrument does not. "Here was a sum of money sufficient to help a young woman over many a rough place if carefully conserved, but not enough to do much towards relieving her from work if she was in health. A spendthrift trust was created so that she would be protected from her own improvidence. The manifest purpose of the settlors was that it should be held as a protection against her necessities, and administered thus for her benefit as a wise father might hold and pay it to her in comparatively small amounts at least for a considerable time. It was not a due execution of the trust to pay it all over within less than three years after the trust was established. At the time of payment to her, the young woman was "deserving." But that was only one of the conditions on which it could be paid to her. She was required to be also "in need of aid." In view of her impending marriage, she was doubtless in need of some money to procure whatever was appropriate for that event in the way of furniture and otherwise. But she did not need the whole. That is shown, if other proof were needed, by the circumstance that over $1,300 was left a considerable time after the marriage."

The plaintiffs' rights were vested and they had done nothing to prevent their exercise. "There is, therefore, no room for the exercise of discretion in granting some relief and their motives in instituting the bill are immaterial. . . . But the plaintiffs are not to be awarded costs." Defendants to account for $1,000. (*Corkery* v. *Dorsey*, 223 Mass. 97.)

Statute of Frauds.— *Held:* The mere setting apart of a carload of oats by the seller under an oral contract for future delivery was not an acceptance by the buyer to avoid the Statute of Frauds. (*Peck* v. *Abott, &c., Co.*, 223 Mass., March 3.)

Stock-broker — Bankruptcy of Broker — Delay in Tender of Stocks Purchased for Customer.— Bankrupt brokers had purchased stocks for the defendant (not on margin) and were petitioned into bankruptcy a few days later in February. A receiver was appointed. The defendant went to the Boston office of the brokers, tendered the amount, demanded his stock, was refused by the person in charge, and the defendant's attorney then wrote a letter to the receiver demanding the stocks and offering to pay for them on delivery, which was refused. The plaintiff was appointed trustee in bankruptcy in March. The defendant took no steps in the bankruptcy proceedings. In November the plaintiff trustee demanded payment and preferred certificates. The defendant refused. The plaintiff sold the stock in the market at a loss and sued for the deficiency. *Held:* 1st, The case is governed by *Wood* v. *Hayes*, 15 Gray, 375, which "has been recognized as the foundation of the Massachusetts rule that ordinarily the title of stocks purchased by a broker for his customer remains in the broker until delivery,"

and as neither made demand or tender no cause of action arose in favor of either party against the other. 2d, "If it be regarded that the intervention of bankruptcy would have enabled the trustee to elect to affirm the contract," he could not wait from March until November to do so. (*Brown, Tr.*, v. *Rushton*, 223 Mass. 80.)

SURFACE WATER — OVERFLOW FROM HIGHWAY DUE TO WORK OF SURVEYOR OF HIGHWAYS, A PUBLIC OFFICER.— Bill against City to restrain overflow and for damages. The proximate cause was the construction of a certain kind of catch basin and underground drain, "not done by order of the City or any of its authorized agents. It was done by the Surveyor of Highways in performance of his ordinary duty of keeping the streets . . . reasonably safe and convenient for travel." *Held:* 1st, "Such work done by that officer is not in law the act of the City. He is a public officer discharging a public duty. He is not the agent of the City. His negligence is not the negligence of the City." Case controlled by *Smith* v. *Gloucester*, 201 Mass. 329. 2d, "The fact that by the establishment of the grades of several streets a greater volume of surface water collected at the junction of these two streets is not of consequence. Other means are provided for the recovery of property damage sustained from that cause. (*Woodbury* v. *Beverley*, 153 Mass. 245.) It is not necessary now to consider or decide what may be the liability, if any, of a city or town to one sustaining an injury directly resulting from the failure of its highway surveyor to keep open and clear from obstruction a passage for a brook or other natural water course under a highway laid out and constructed by public officers and not by private agents." (*Dupuis* v. *Fall River*, 223 Mass. 73.)

TAX — DOMESTIC CORPORATION FRANCHISE — REMEDY FOR OVERVALUATION OR WRONGFUL ASSESSMENT.— *Held:* The remedies by appeal under § 68 or petition under § 70 of Part III., c. 490, of 1909, are exclusive and a corporation failing to resort to them cannot set up errors in assessment in defence to an information to collect the amount assessed. (*Atty. Gen.* v. *East Boston Co.*, 222 Mass. 450.)

TAXATION — FRANCHISE TAX OF DOMESTIC CORPORATION — NATIONAL BANK STOCK INCLUDED IN COMPUTATION.— Petition to test validity of excise tax. *Held:* The inclusion by the Tax Commissioner (contrary to previous practice) of National Bank stock owned by the corporation in computing the domestic franchise tax was proper in spite of the appearance of double taxation. "This case has been considered and decided, as it was argued, upon the assumption that the payment of the property tax upon the shares of National Bank stock owned by the plaintiff was valid but without so deciding." Petition dismissed. (*A. J. Tower Co.* v. *Com.*, 223 Mass., March 7.)

TAXATION.— *Held:* Cash on deposit April 1st in a trustee's bank account derived from dividends and payable as income to beneficiaries shortly after is taxable "as property;" it is not within the clause "Incomes derived from property subject to taxation" in St. 1909, c. 490, Part I., § 4, cl. 4. (*Loring, Tr.*, v. *Beverly*, 222 Mass. 331.)

TAXATION — SURVIVORSHIP IN JOINT TENANCY NOT WITHIN SUCCESSION TAX LAW.— Two sisters, each contributing one-half, made deposits in savings banks, and bought securities as joint tenants, and being tenants in common of real estate by inheritance and conveyance, created a joint tenancy in

themselves by conveyance through a third person. *Held:* 1st, "It cannot be found that there was a gift of one-half of the property to take effect in possession and enjoyment after the decease of the testatrix so as to be taxable under the statute because the joint tenancy was not severed during the lifetime of the tenants. Each sister contributed an equal amount for her interest in the real and personal property when the joint tenancy was created, and there is nothing to show that the right of survivorship was not as valuable to one as to the other." 2d, Survivorship in joint tenancy is not subject to succession tax as an interest passing "by the laws regulating interstate succession" within 1909, c. 490, Pt. IV., § 1. "We think that the 'laws' regulating interstate succession mean the statute laws relating to the descent and distribution of intestate estates, and do not include the succession of property which passes under . . . of the common law. Joint tenancy arises under the common law. (*Atty. Gen.* v. *Clark*, 222 Mass. 291.)

TAXATION — FOREIGN-HELD MORTGAGE OF MASSACHUSETTS LAND SUBJECT TO INHERITANCE TAX. — *Held:* The provision in St. 1912, c. 678, § 1, subjecting to inheritance tax "all real estate within the Commonwealth, *or any interest therein belonging to persons who are not inhabitants of the Commonwealth*" covers a mortgage held by a non-resident decedent. *Hawkridge et al.* v. *Mass. & Treas. Gen'l.*, 223 Mass. 134.)

TAXATION — INHERITANCE — DEDUCTIONS FOR TAXES PAID IN OTHER STATES ON STOCK IN FOREIGN CORPORATIONS. — A deceased citizen of Massachusetts left stock of the Chicago & Northwestern Ry. Co., which was organized and exists under the laws of . . . Illinois, Wisconsin and Michigan . . . has but one capital stock and conducts its business as a single corporation, seven per cent in value of its total property being located in Michigan. There were also shares of Chicago, Milwaukee and St. Paul Ry. Co. organized in Wisconsin with lines in Michigan and other states. By judicial proceedings Wisconsin collected one per cent on the entire holdings in the Chicago, Milwaukee and St. Paul and on a percentage of the holdings in the Chicago & Northwestern, proportionate to the total value of the property of that company situated in Wisconsin. Michigan, also by judicial proceedings, collected one per cent on the full value of the holdings in both companies. In computing the Massachusetts taxes the Tax Commissioner deducted from the Massachusetts rate, all the taxes paid to Wisconsin on both holdings, but declined to deduct any of the Michigan tax on the St. Paul and deducted only a part of the Michigan tax on the Northwestern. On petition for refund, *Held:* 1st, Our statute exempting property of a resident decedent "if legally subject in another State or country to a tax" does not leave the question "to the decision of the Courts of other states or countries," but puts upon our tax officers and Courts the "duty of ascertaining whether the property . . . taxed (in the other states) was in law subject to taxation." That "depends fundamentally upon the jurisdiction . . . over the property" and that must be decided here "if it has not been decided by the Supreme Court of the United States." 2d, As a succession tax is an excise on some essential incident in the transfer of title the mere presence in Michigan of property of a Wisconsin corporation does not subject the shares in that corporation to such an excise in Michigan and accordingly the St. Paul shares were not "legally subject to a tax" in Michigan and such tax if paid cannot be deducted in computing the Massachusetts tax. 3d, As to the

Northwestern, the entire Michigan tax must be deducted in computing the Massachusetts tax. Michigan, as one of several incorporating states, had jurisdiction over the transfer and succession of the corporate stock. "That was settled for this Commonwealth by *Kingsbury* v. *Chapin*, 196 Mass. 533. . . . The rule enforced by the inferior Michigan Court was to collect a succession tax like in amount to that which could have been enforced if the corporation had owed its existence solely to the laws of Michigan. It did not follow the rule laid down in *Kingsbury* v. *Chapin*, 196 Mass. 533 (and cases cited from other states), to the effect that in such cases the value of the stock for purpose of calculating the tax should be based upon the value only of the property in the State levying the tax, and a tax levied only upon such portion of the value of each share as is represented by property of the corporation in the taxing State. That appears to us to be the just and equitable view. It is founded upon the principles of interstate comity to be observed in the interpretation of laws which, unless so construed, may afford ground for conflicting and rival claims between the the several states and for just complaint as being oppressive in operation. No other view has been expressed by the Supreme Court of Michigan. But we are bound to accept for the moment the decision of the county Probate Court, from which no appeal was taken, as expressive of the law of that State.

The question arises whether the principle established by *Kingsbury* v. *Chapin*, 196 Mass. 533, is one of constitutional and jurisdictional power or simply of comity and justice in taxation between the several states. . . .

The conclusion is that the tax levied by Michigan on the Chicago & Northwestern Railway stock, although in conflict with the principles established by *Kingsbury* v. *Chapin*, 196 Mass. 533, and contrary to what we believe to be the closest reasonable approximation to fairness, does not infringe any provision of the federal constitution or exceed the jurisdictional power of that state." (*Welch* v. *Treas. & Recr. Gen'l*, 223 Mass. 87.)

Tort against Dentist for Dropping Teeth in Plaintiff's Lung. — Defendant, while extracting several of plaintiff's teeth, dropped one, which disappeared. There was evidence to show plaintiff in good health before, but that soon afterwards he had a cough, a pain in his side, dizziness, numbness in right arm and leg and partially lost his speech. After nine weeks he coughed up a tooth produced in evidence and he testified that "his coughing was relieved immediately thereafter." There was no dental, medical or other evidence to connect the symptoms with the tooth. Defendant's experts testified that the tooth was not the cause. Defendant requested a ruling that there was no evidence to justify finding that plaintiff's ailments were caused by inhaling the tooth. This ruling was not given, there was a verdict for plaintiff and on exceptions *held*, the ruling should have been given in substance. "Whether the causal connection existed depended upon proof and could not be left to conjecture or speculation." Exception sustained. (*Toy* v. *Mackintosh*, 222 Mass. 430.)

Trade Name — Extent of Market. — Plaintiff had 41 retail stores in nine different states including 24 in New York and Brooklyn, one in Providence and two in Boston, at which he sold hats at $1.50 under his established trade name. The defendant imitated the hats, the name and the stores in Worcester, Woonsocket, and New Haven, and plaintiff sought to restrain him. There was no evidence as to the area of the market of the plaintiff's

several stores. *Held:* Although it is not necessary to show that particular customers were diverted, there must be some evidence of the extent of the market "before it can be inferred that every retail haberdasher's store has a trade circle with a radius of seventy-five miles. It does not seem easy to infer that men would travel from sixteen to seventy-three miles from cities like Woonsocket, Worcester and New Haven to spend one dollar and a half for a hat." Bill dismissed. (*Kaufman* v. *Kaufman*, 223 Mass., March 2.)

TRUST, RESULTING — LAND IN NAME OF WIFE AND IN FRAUD OF CREDITORS. — Bill by husband to restrain wife from selling or incumbering land in which he claimed a resulting trust. *Held:* 1st, There was no resulting trust, as the facts did not show that he furnished either the whole, or a definite part, of the consideration with the intention of acquiring an interest in the whole or a fixed fraction. 2d, A "conveyance fraudulent as to creditors is good between the parties," and "neither party can change the effect of the conveyance as between themselves by appealing to the purpose of either in reference to creditors." Bill dismissed. (*Pollock* v. *Pollock*, 223 Mass., March 7.)

TRUSTEE IS LIABLE TO ACCOUNT FOR INTEREST RECEIVED. — (*Thompson* v. *Knapp*, 223 Mass.)

WAY OF NECESSITY — EXTINGUISHMENT BY EXTENSION OF PUBLIC WAY. — *Held:* An opening of five feet nine inches from the dominant estate (a vacant lot in a residential district) on a *new* public way, "in view of . . . all the circumstances . . . cannot be found" to be "reasonably sufficient to the beneficial enjoyment of the dominant estate," so as to extinguish an existing way of necessity. "We do not mean to intimate that in all cases a way of necessity should be wide enough to allow the passage of teams and other vehicles." (*Hart* v. *Deering*, 222 Mass. 407.)

WAY — LOST PLAN — UNDEFINED LOCATION DEFINED BY COURT. — Bill to enjoin obstruction of a way. A deed in 1855, referring to "the plan of these premises," created a right of way over land of the grantor, consisting of a pasture in a small country town, which lies between the lot conveyed and a public highway, and the deed after description contained the words, "The contemplated street running northerly from this lot, to which the name of Mead Street is given on the plan aforesaid, is to be laid out within one year from the date of this instrument." No such street was ever laid out, nor was any way defined, but the predecessors of the plaintiff passed over the servient pasture, according to their convenience, in places varying with the uses to which the pasture was put by the defendant's predecessors. It was used as a pasture up to 1875, and "bars were maintained as convenient."

The plan was not put in evidence, and appears to have been not only unrecorded but lost. The master found that the right of way still existed, and located it. *Held:* 1st, The case "stands as an undefined right of way, which a court of equity may locate in a reasonable manner." 2d, "The barways were not necessarily incompatible with such rights of passage as the plaintiff and her predecessors in title may have needed." Finding and location by master confirmed. (*Burnham* v. *Mahoney*, 222 Mass. 524.)

WILL — CONSTRUCTION — "HEIRS-AT-LAW AND NEXT-OF-KIN." — Bill for instructions. A testamentary trust to pay the income to two brothers and their heirs, with a quarterly annuity to the widow of each brother, was to con-

tinue "only so long as there is a widow living of either of my said brothers, and as each widow shall die, one-half the principal of said trust estate, together with any income that may remain, whether apportionable or not, shall go to and become the absolute property of the heirs-at-law and next-of-kin of such brother, in equal portions, share and share alike, the children of any deceased child taking by right of representation the parent's share." One of the brothers died, leaving two children and a widow. Later the widow died. *Held:* 1st, "That by 'heirs-at-law and next-of-kin' the testator meant the children of the brother, and did not intend to include the widow as a statutory heir; that the children's interest vested at the time of the death of the brother, and that each was entitled to one-quarter of the trust estate." 2d, "By the 'income that may remain' at the death of the widow, the testator meant her share of such income . . . accumulated since the last periodical payment . . . by the trustee, and that that share should be divided" as income, as directed in 214 Mass. 114. 3d, "Income . . . accrued after the widow's death was to be divided as . . . principal." 4th, "The one-half interest of the children of the brother in . . . real estate . . . of the trust . . . vested in them without any formal conveyance by the trustee." 5th, "Instructions will not be given as to a detail in the administration of the trust, regarding which there is no present controversy, nor in reply to a request that is too general to admit of a definite reply." (*Bailey* v. *Smith*, 222 Mass. 600.)

Will — Life Estate with Power to Sell and Use the Proceeds with Remainder over of the Unused Balance. — Bill for instructions by executors to determine the estate granted in order to compute inheritance tax. The testator gave his wife the use and income of all his estate "for her support, comfort and enjoyment and for any other purpose as she in her judgment may deem necessary." If the income should be insufficient in her judgment for her support, comfort, and enjoyment "or for any other purpose for which she may wish to spend money" the power was given her to sell "any of my estate, real, personal and mixed," and to spend the proceeds " . . . for her support, etc. . . . or for any purpose she may wish to spend money" and to convey " . . . by deed or other instrument in her own name for the above named purpose or for investment." The remainder undisposed of on her death was given to others. The Probate Court decreed that the widow took not a fee but a life estate with a power of disposal to the extent set forth in the will and the remainder over vested subject to its being divested by exhaustion of the estate, for the purposes mentioned, by the life tenant in the exercise of good judgment and sound discretion and that the tax on these interests was to be computed accordingly. On appeal by the widow. *Held:* Decree of the Probate Court affirmed. (*Kemp* v. *Kemp*, 223 Mass. 32.)

Will — Construction. — The testator having a wife, two children and one grandchild in 1876 made his will giving the bulk of his property in trust to pay an annuity to his wife for life and the balance of income to his two children and then

"I desire that this trust terminate ten years after the decease of my wife Emily, and the original Trust Fund be divided equally between my two children Emily and William. . . . If either of my children die without issue, before the termination of this trust, I wish one-half part of the

income he or she would receive if living be given to the surviving child, and the other half part to such Charitable and Educational purposes as My Trustees shall see fit. If both children die without surviving issue, then I wish the whole income to be given to Charitable and Educational purposes as before mentioned and at the termination of this Trust if both children shall have died without issue surviving I wish the property to be given to such Charitable and Educational purposes as the Trustees think best, unless either child shall have left a wife or husband then I desire the trustees to give to such wife or husband such proportion of the income or original fund as they think would be given by me if I were then alive."

The widow of the testator died intestate in 1905 so that the trust terminated in 1915 and one child of the daughter being the only member of her family then living the question arose in connection with the inheritance tax whether such child took as heir of his mother or by implied gift under the will of his grandfather the testator. *Held:* That there was an absolute gift to each child of the testator of one-half the fund at the termination of the trust subject to be divested upon certain contingencies which had not occurred and therefore the remaining grandchild took as heir of his mother and not under the will. (*Hall et al.*, v. *Beebe et al.*, 223 Mass., March 3.)

Will — Construction — Surplus Income of Fund for Care of Cemetery Lot. — A testamentary gift to the town of Natick of a residue as a perpetual trust "the income of which is to be used for the preservation of the monument which my executor is hereby authorized to erect at my grave and for the care and beautifying of my lot in the cemetery," was sustained in 176 Mass. 510. The trust further provided "The town shall not expend a greater sum than four per cent per annum, deeming that as large an amount as the town ought to pay," and a bill in equity was brought to procure a conveyance of real estate in the trust on the ground that the income from money in the trust was sufficient for the purposes. No facts appeared as to the accumulation of this money or whether the trust had been carried out during its accumulation. *Held:* "The will . . . contains neither statement nor inference that the measure of the trustee's duty is adoption of or conformity to a standard of taste or sentiment as shall from time to time be presented to view in the care, maintenance, and beautification of other burial lots in this particular cemetery. Should the average net income in a series of years exceed four per cent upon the principal or should it prove impossible reasonably to expend the income in the manner provided without waste, a question might fairly be raised as to the disposition of any surplus. . . . No such question is now before us." Bill dismissed. (*McCoy* v. *Natick*, 223 Mass., March 4.)

Will — Construction — Interest on Legacy. — An estate consisting of real and personal property involved a gradual accumulation of funds by sale and investment sufficient to pay legacies, etc., and under certain terms of the will it was argued that what appeared to be an ordinary pecuniary legacy was postponed until the necessary funds were accumulated to pay all similar beneficiaries and did not carry interest. *Held:* It carried interest. (*Gilbert* v. *Batchelder, Exor.*, 223 Mass., March 6.)

Workmen's Compensation — Dependency — Husband and Wife — Finality of Finding of Accident Board. — The Compensation Act provides in Pt. II., § 7 (a), as amended, "The following persons shall be con-

clusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she lives at the time of his death or from whom at the time of his death, the Industrial Accident Board shall find the wife was living apart for justifiable cause or because he had deserted her. The findings of the Board upon the questions of such justifiable cause and desertion shall be final." The deceased employee and his wife separated by mutual consent because he was earning only $11 a week and "was not supporting her as she needed to be supported." Thereafter he contributed from time to time to her support. When he died he was earning $21.60 a week. The Board found that they were living apart for justifiable cause and the wife was presumed to be wholly dependent. *Held:* 1st, The findings of the Board under the statute are "final" only when there is evidence to warrant the finding. 2d, The finding of "justifiable cause" was not warranted and therefore the statutory presumption did not apply. 3d, The dependency of the wife must "be determined in accordance with the fact . . . at the time of the injury" under § 7 (c). 4th, The wife might be found to be a member of his "family" under Pt. V., § 2, although not living with him. (*Newman's Case*, 222 Mass. 563.)

Workmen's Compensation — Night-Watchman Mistaken for Yeggman and Shot by Deputy Sheriff. — The employee was a night-watchman for a construction company at work on the Cape Cod Canal. About 3 A.M. notice was given that "yeggmen" had robbed the safe in the Bourne Post Office. The sheriff and his brother were in pursuit and near the company's buildings, and in the darkness and fog saw and were seen by the watchman and the bridge operator. Each party mistook the other for "yeggmen," shots were exchanged and the watchman killed. The Accident Board found for the dependent. *Held:* 1st, As the Board found that he thought he was defending himself from attack of desperate criminals "we cannot say as matter of law that the facts show such misconduct" as to bar compensation under St. 1911, c. 751, Pt. II., § 2. 2d, The finding that the injury arose in the course of his employment was warranted. 3d, "He was not shot while protecting his employer's property from thieves. . . . The property was in no way threatened, nor did the deceased suppose it was. And he was not fired upon because he was the watchman in charge. The injury might . . . have been suffered by any person who happened to be in the locality. . . . Further, although the deceased mistakenly believed that the two approaching figures were 'yeggmen,' they were in fact an officer of the law and his assistant, . . . in the performance of their duty. . . . The injury . . . was the result of . . . misapprehension . . . and cannot reasonably be said 'to have had its origin in a hazard connected with the employment and to have flowed from that source as a rational consequence.'" Decree reversed and entered for insurer. (*Habroe's Case*, 223 Mass. 139.)

Workmen's Compensation — Employee killed by Fall from Roof while getting Fresh Air. — The Accident Board found that the deceased employee, a newspaper compositor, in accordance with known custom, though in violation of rule which had become a dead letter, went out at midnight from a very hot, poorly ventilated room, down some iron stairs to a roof and "accidentally walked over the edge or became dizzy and slipped off" an unguarded place twenty-three feet from the foot of the stairway. He was last seen

alive about 11 P.M. and his body was found at 3.45 A.M. The Board found no suicide, no intoxication, and that the death was accidental and arose out of, and in course of, employment. *Held:* 1st, "There was no evidence of suicide and therefore the presumption against the commission of a crime is enough to support the finding on that point. 2d, There being no evidence of liquor and no other cause of death being suggested, except accident, we cannot say the finding was not warranted. 3d, As to the connection of the injury with the employment "a majority of the Court are unable to say that the finding of the Board was wrong . . . the conclusion which we have reached is abundantly supported by the decisions of the English Courts" (cases cited). 4th, "The evidence admitted . . . against the objection of the insurer, even if incompetent, did not . . . injuriously affect the substantial rights of the insurer, St. 1913, c. 716." Decree for dependent affirmed by majority. (*Von Ette's* (*Dependent's*) *Case*, 223 Mass. 56.)

WORKMEN'S COMPENSATION — (MUNICIPAL) — MEANING OF "LABORERS, WORKMEN AND MECHANICS." — *Held:* A hoseman in the regular Boston fire force is not within c. 807 of 1913, extending the compensation act to "laborers, workmen and mechanics" employed by cities and towns. "The Legislature at the date of enactment must be presumed to have known that under previous and unrepealed legislation the city in common with other municipalities had an established fire department with a fixed and permanent tenure of service for its members who had been expressly recognized as being in a class by themselves, and that this Court in *Fisher* v. *Boston*, 104 Mass. 87, had held them to be public officers for whose negligence when acting in the discharge of their duties the city is not responsible. . . . If then extending the compensation act it also was the purpose to include all persons of whatever rank serving in the various municipal departments, plain and unambiguous terms should have been used showing the change and enlargement." (*Deveney's Case*, 223 Mass.)

WORKMEN'S COMPENSATION — DEPENDENCY. — The claimant was a sister of the deceased employee who, fifteen years before induced her to keep house for him by promising to support her. He furnished all the money for the household except board paid by another sister and a little rent from a house owned by all three, and he paid for the claimant's clothes and other needs. She had $600 in a bank and one-third interest in $1,300 worth of productive real estate. *Held:* The facts warranted the finding that she was "dependent" but not "wholly dependent." "We do not take into consideration what has come to her as one of his (the employee's) heirs, because the act points to matters antecedent to the employee's death. *Pryce* v. *Penrikyber Navigation Colliery Co., Ltd.*, (1902) 1 K. B. 221." (*Kenney's Case*, 222 Mass. 401.)

WORKMEN'S COMPENSATION — PARTIAL INCAPACITY — RATE OF COMPENSATION. — In 1912, before the injury, the employee's wages were $22. He received maximum compensation until 1914, when he returned to work partially incapacitated and his wages were $13.20. The Accident Board found that after he returned business was dull; that if it had not been dull he would have received $15, and that if he had been fully capable when he returned he would probably have received only $19.40 because of the dulness. He was awarded one-half the difference between $22 and $13.20. On appeal, *Held:*

His inability to earn $15 after his return was due to business conditions and not to the injury. The rate should have been one-half the difference between $22 and $15. (*Durney's Case*, 222 Mass. 461; cf. note *Harv. Law Rev.*, May, 1916, p. 787.)

WORKMEN'S COMPENSATION — PREËXISTING DISEASE — "PERSONAL INJURY" — CONSTITUTIONAL LAW.— The Accident Board found that the employee had "a weak heart condition" before she entered the service, that her work was to repair bad spots in the weaving on rolls of carpet and pulling the carpets along a table for this purpose, that in pulling "she felt something give way" and the condition of her heart was so aggravated as a result that she was incapacitated. This was found to be a personal injury arising out of and in the course of her employment. *Held:* This finding was warranted.

"The standard established in this respect by our Workmen's Compensation Act as the ground for compensation is simply the receiving of 'personal injury arising out of and in the course of' the employment. This standard is materially different from that of the English act, and of the acts of some of the states of this nation. That standard is personal injury by accident. . . .

The difference between the phraseology of our act and the English act in this respect cannot be regarded as immaterial or casual.

Without undertaking to define 'personal injury' or to go beyond the requirements of the facts here presented, it is enough to say that the occurrence described by the dependent when she said 'she felt something give' and 'felt something else give way,' accompanied by the symptoms of angina pectoris, may have been found to be 'a personal injury.'

That injury also may have been found to have arisen out of the employment. The pulling of the carpet, although not requiring such putting forth of muscular power as would have affected a healthy person, yet may have been enough to cause the injury which the employee suffered. It could have been regarded as resulting from the work as a contributing proximate cause. . . .

Even under the English act it seems that a personal injury such as that here disclosed would be held to have arisen 'by accident' and hence to be within that act. (Cases cited.) . . .

It has been argued . . . that since the harm . . . came in large part from the previous weakened condition . . . hence . . . compensation . . . should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. . . . The act makes no provision for any such analysis or apportionment. It protects the 'employee.' That word is defined in Part V., § 2, as including 'every person in the service of another under any contract of hire' with exceptions not here pertinent. There is nothing said about the protection being confined to the healthy employee. . . .

The act is not a substitute for disability or old age pensions. It cannot be strained to include that kind of relief. Its ultimate purpose simply is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. . . . Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation. The relief is so new that the tendency may be to inquire only as to the employ-

ment and the injury and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. . . . In passing upon this question, a humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease, which under any rational work is likely to progress so as finally to disable the employee, does not become a 'personal injury' under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. . . . The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made. . . .

It is argued that grave economic consequences of far-reaching effect may follow from the act as thus construed. It is said that persons not in good health may be altogether excluded from employment, to their severe hardship, while the cost of conducting commercial and industrial enterprises may become prohibitively large, all to the detriment of the general welfare, and of the financial resources of the Commonwealth. These considerations are of great public moment. But these factors relate to legislative questions, and the arguments founded on them are distinctly legislative arguments. . . .

The constitutionality of the act as thus interpreted is assailed. It is urged that the employer is compelled to part with property for causes for which he is in no wise responsible, and that thus he is deprived of property without due process of law. In its essence that is an attack upon the act as a whole, for in none of its ordinary aspects does the payment required by the act depend upon fault, and it may be required in many cases where the employer was wholly free from fault. In support of this attack cases . . . are relied upon where statutes have been stricken down, which have undertaken to make one liable in an action-at-law for injuries, etc. . . . for which he was in no way responsible. . . . The case at bar is quite distinguishable. The Workmen's Compensation Act is elective and not compulsory. It is wholly optional with the employer, as it is with the employee, whether he comes under the provisions of the act or stays outside and stands on his legal rights. The connection between the employment and the injury in the case at bar is the same in kind as in the manifold other instances where the personal injury to the employee is caused by a definite physical blow wholly without fault of the employer. The act is not unconstitutional in this respect. . . ." (*Madden's Case*, 222 Mass. 487.) (For a note on this case see *Harv. Law Rev.*, May, 1916, p. 752.)

WORKMEN'S COMPENSATION (MUNICIPAL) — AGGRAVATION OF PRE-EXISTING DISEASE. — A city employee with dormant syphilis was working in a ditch, which caved in on him, causing a shock to his nervous system sufficiently severe to aggravate his condition, "until general paralysis or insanity resulted, depriving him of all capacity for work in the future." *Held:* Finding of causal connection between the accident and the result, and compensation for total incapacity were warranted. (*Crowley's Case*, 223 Mass.)

WORKMEN'S COMPENSATION — PARTIAL DEPENDENCY — "NEXT-OF-KIN." — A minor employee was killed. He left an intemperate father from whom he had separated, and a half-brother, the claimant, with whom he lived and whom the Court found to be a member of the family of the deceased and partly dependent upon his wages, and award was made to the claimant by the Accident Board and confirmed by the Superior Court. On appeal, *Held:* That under § 2 of Pt. V. of the act (c. 751 of 1911), where the nearest of kin was not dependent, no one else could benefit, and as the father of the deceased was not dependent the half-brother was excluded. Decree reversed and claim disallowed. (*Kelley's Case*, 222 Mass. 538.)

Note.

The secretary has received the following question in regard to this case: "Was it not the intention of §§ 7 and 8 of Pt. II. of the act to take care of all cases of dependency in the following order: first, among persons wholly dependent; second, if there are none, then among persons partly dependent; and third, only where there are no dependents, limiting the liability to funeral expenses?"

WRIT OF REVIEW. — *Held:* The writ is not to be used to give relief from results naturally following upon dilatory and negligent preparation or trial of causes. The issuance of the writ is a matter of discretion, and it cannot be said that such discretion was wrongly exercised as matter of law in this case. (*Watson, Admr.*, v. *Wenz*, 223 Mass., March 4.)

WRIT OF PROHIBITION — ITS FUNCTION. — Petition for writ of prohibition forbidding the selectmen of Norwood to act under alleged invalid, but completed, proceedings locating a way over petitioner's land. *Held:* "The writ is preventative and not corrective. It looks to the future and not to the past. The function of that writ is to restrain excesses of jurisdiction intended to be committed by judicial or quasi judicial tribunals, officers and boards. It is not available for the purpose of restraining executive, administrative, or legislative officers or bodies, from acting where they have no authority." Petition dismissed. (*Smith* v. *Selectmen of Norwood*, 223 Mass. 222, March 3.)

F. W. G.

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